TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [illegible]

No. [illegible] 17

MARCELINA TORRES ZAYAS, APPELLANT AND PLAINTIFF IN ERROR,

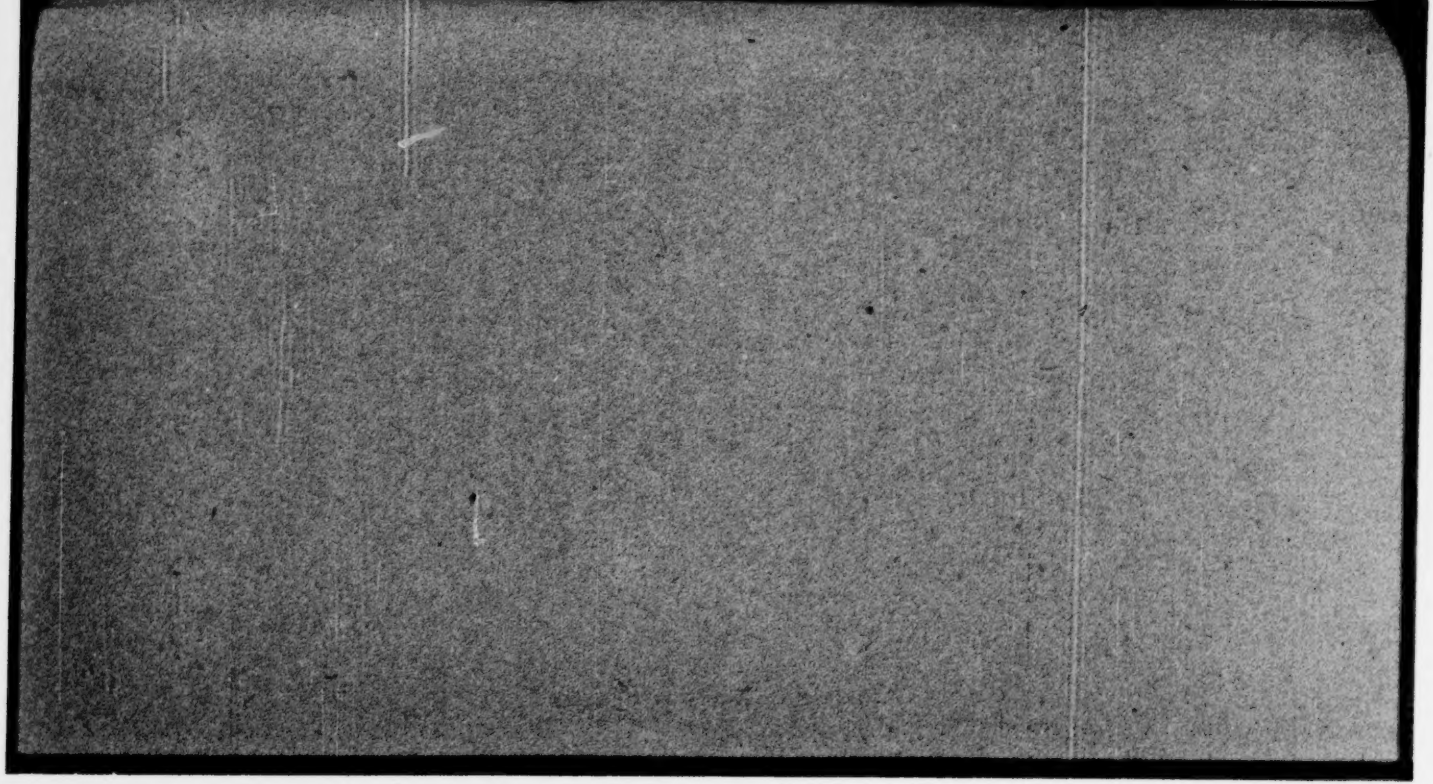
vs.

LOTHROP, LUCE & COMPANY, PEDRO JUAN ROSALY Y CAPO, AND ALICE LOTHROP.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF PORTO RICO.

FILED NOVEMBER 16, 1916.

(22,404)



(22,404)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 435.

MARCELINA TORRES ZAYAS, APPELLANT AND PLAINTIFF IN ERROR,

vs.

LOTHROP, LUCE & COMPANY, PEDRO JUAN ROSALY Y CAPO, AND ALICE LOTHROP.

APPEAL FROM AND IN ERROR TO THE SUPREME COURT OF PORTO RICO.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 2, 1912.

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1 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO JUAN ROSALY Y CAPÓ, and ALICE LOTHROP.

Appeal from the District Court for the Judicial District of Ponce, P. R.

Transcript of Record on Appeal to the Supreme Court of the United States.

Record of the proceedings of the Supreme Court of Porto Rico in the above entitled cause, which is an action involving: 1st. The nullity of a foreclosure proceeding and judicial sale, as well as that of a mortgage and of certain registrations made in the Registry of Properties; 2nd. Claim of certain rents and proceeds of fruits; and 3rd. Damages, the same having been disposed of at the third regular term of said Court in the year 1910, the following papers having been filed, and the following proceedings having been had therein, to wit:—

2 In the Supreme Court of Porto Rico.

No. —.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO JUAN ROSALY CAPÓ & ALICE LOTHROP.

Action involving: 1st. The nullity of a foreclosure proceeding and judicial sale, as well as that of a mortgage and of certain registrations made in the registry of property; 2nd. Claim of certain rents and proceeds of fruits; and 3rd. damages.

Transcript of Record.

Amended Complaint.

Before the Honorable the Judge of the Court:

Now comes the plaintiff Don Marcelino Torres Zayas, by the undersigned attorneys, his counsel, and files this suit involving: 1st. the nullity of a foreclosure proceeding and judicial sale of the mortgaged property, as well as that of the mortgage constituted by the

purchaser thereof, and of certain registrations made in the Register of Property; 2nd. claim of the proceeds of fruits and rents received therefrom; and 3rd. damages, the said suit being brought against the partnership Lothrop Luce and Co., Don Pedro Juan Rosaly y Capó, and Doña Alice Lothrop.

And as first cause of action, he alleges:

1st. That on the 26th of February, 1901, the plaintiff, Don Marcelino Torres Zayas, who was then married to Doña Mercedes Laborde Perez, entered into a mortgage contract with Mr. William Sturgis Hooper Lothrop, by a public deed executed on
3 the aforesaid date, before Don Rosendo Matienzo Cintrón, a Notary Public; a literal copy of which deed is herein filed, marked as exhibit A, and made an essential part of these allegations.

The said deed was recorded in the Registry of Property of Ponce, in so far as the mortgage constituted by Mr. Torres in favor of Mr. Lothrop was concerned, at folio 245 of Book 30 of Juana Diaz, property No. 1538, registration No. 8.

2nd. That by virtue of the said mortgage contract executed in the aforesaid deed, a literal copy of which is herein filed as exhibit A, as above stated, the debtor Don Marcelino Torres paid to his creditor William Sturgis Hooper Lothrop, during the ensuing years and as interest thereon, the following amounts: Four thousand six hundred dollars as interest due on the 26th of February, 1902; another four thousand six hundred dollars as interest due on the 26th of February, 1903; and another four thousand six hundred dollars as interest due on the 26th of February, 1904. That on the 3rd. of May, 1904, the debtor Torres Zayas did not owe any amount whatsoever, as interest due on said mortgage, to the creditor Mr. Lothrop. The payment was made in the manner stated in the following allegation.

3rd. That in the 9th clause of the mortgage deed filed herewith, "the contracting parties, Torres and Lothrop, agreed that all the produce of the mortgaged properties should be delivered to Mr. De Ford and Co., of Ponce, to be sold by them, so that the latter should deduct from the value of said produce the amount of the interest which should be paid annually to the creditor Mr. Lothrop, and the balance should be delivered to the debtor Mr. Torres, to cover
the regular expenses of the properties, and the latter should
4 apply to the extinction of the debt such sums as might be in excess of such expenditures.

And in furtherance of the aforesaid 9th clause, Mr. Torres delivered to De Ford & Co., who, for this purpose, were appointed agents of William Sturgis Lothrop in the mortgage deed, all the produce of the mortgaged property, that is of the property named "Semil," from the date on which the mortgage was constituted up to the 3rd of May, 1904; that the produce delivered by Mr. Torres to De Ford & Co. during the year from the 26th of February, 1903, to the 26th of February, 1904, were sold by them and the money so obtained from the sale, which greatly exceeded the amount of the interest due during that year and payable on February 1904, was delivered to them, as agents appointed for this purpose by William

Sturgis Lothrop, the object of the delivery of said money being to pay, in the first place, said interest in accordance with the aforesaid clause, and in this manner the interest due on the 26th day of February, 1904, was paid off.

4th. That when the said mortgage was constituted, the debtor Torres Zayas delivered to the attorney-in-fact of his creditor Mr. Lothrop, eight notes for the amount of five thousand seven hundred and fifty dollars each, it being stated on every note that the same bore interest at the rate of ten per cent. per annum, the said notes, and the interest thereon, being payable on the 26th of February, 1905.

That the creditor Mr. Lothrop ceded the said notes to third persons, before the 26th of February, 1904, and the said notes were also in the hands of third persons, on the 3rd of May, 1904, and long time thereafter. And the amount of said notes covered the interest of the debt as well as the principal.

5 5th. That notwithstanding the facts stated in the foregoing allegations, Mr. William Sturgis Hooper Lothrop filed a complaint on the 3rd of May, 1904, in the District Court of Ponce, against Don Marcelino Torres Zayas, to recover the sum of four thousand six hundred dollars due on the 26th of February, 1904, on the mortgage above referred to, which amount had already been paid, as stated above, and in said complaint Mr. Lothrop instituted the special proceeding authorized by the Mortgage Law for the foreclosure of mortgages. The aforesaid mortgage deed and the registration made in the Registry of Properties of Ponce showed that Don Marcelino Torres Zayas was married when he acquired the mortgaged properties and that, as a consequence thereof, said properties belonged in equal parts to him and his wife Da. Mercedes Laborde. And nevertheless, the aforesaid suit was brought by Mr. Lothrop against Don Marcelino Torres only.

A copy of said complaint follows as an essential part of these allegations; it reads as follows:

"Ponce, April 25, 1904. Hon. Court of this Judicial District.—Now comes R. Ulpiano Colóm, attorney-at-law before the Hon. District Court, on behalf of Mr. William Sturgis Hooper Lothrop, a merchant having his domicile in Boston (State of Massachusetts), and respectfully states: That Don Marcelino Torres y Zayas, a farmer, and a resident of Juana Díaz, is owing to my client the sum of four thousand six hundred dollars as an instalment due on, and secured by a mortgage hereinafter mentioned, and all privaate efforts which have been made for the collection of said sum having failed, the special proceeding authorized by the Mortgage Legislation in force is hereby instituted for such purpose, the com-

6 plaint being based on the following facts and juridical reasons:

Facts.—First. In the public deed executed in this city, on the 26th of February, 1901, before Don Rosendo Matienzo Cintrón, a Notary Public, Don Marcelino Torres y Zayas, a farmer, of age, and a resident of Juana Díaz, declared to be owing to Mr. William Sturgis Hooper Lothrop, married, a merchant, and a resident of the

city of Boston (State of Massachusetts U. S. A.) the sum of forty six thousand dollars ($46,000.00), which he bound himself to pay in this city, on the twenty first day of February, nineteen hundred and five (February 21st, 1905), without any other excuse than that which might be based on the existence of a cyclone or any other unforeseen event.—Second. It was agreed in the same document that the capital stated above should bear interest from the said date, the 26th of February, 1901, up to the final and total payment thereof, at the rate of 10% per annum, payable by the debtor Mr. Torres Zayas to the creditor Mr. Lothrop or to his legal representative in this city, in annual instalments after they had become due, on the 26th day of February, of each of the ensuing years, without excuse or pretext whatsoever. Third. In order to secure the payment of said principal and interest, the debtor Mr. Torres y Zayas, and Mrs. Collazo, Perez Guerra and Co., the latter appearing as contracting parties in the following deed, constituted a voluntary mortgage upon several properties, among others, one belonging to the former, the description of which, is as follows: A coffee plantation, named "El Semil" situated in the ward of Villalba-arriba, in the
Municipal jurisdiction of Juana Díaz, covering an area, of
7 five hundred and thirty five cuerdas and sixteen hundredths,
equivalent to two hundred and ten hectares fifty three ares and ninety-two centiares, with the following establishments: A wooden dwelling house, covered with zinc; another house of the same construction for a store; a wooden ware-house, covered with zinc for the storage of fruits with special arrangements for the drying thereof, on the ground floor; a hulling-machine for coffee; a shed for laborers and twelve small wooden houses covered with zinc, as a dwelling for the laborers' families. The said property is bounded on the North by a public road and by lands belonging to Juan Felix Baez, Socorro García, and to the Succession of Don Severo Segarra; on the East, by lands belonging to Don Domingo Olivieri, to the Succession of Catalina Mato, to Lucas Negrón, Julián Negrón, to the said Don Domingo Olivieri, to the Succession of Juan Angel Rosario, to Tomás Negrón and to José Torres; on the South, by lands belonging to Don Genaro Rivera, Don José del Carmen, Doña Dominga Negrón, Don Marcial Serrallés, Don Eduvigis Rodriguez, Don Ramón Sanchez, Don Pedro Morales, and Don Antonio Santí; and on the West, by a public road and lands belonging to Don Juan Zaragoza, Don José del Carmen Negrón, and to the Succession of Don Severo Segarra. Fourth. It was expressly stipulated, and it was so specified when the liability of each of the mortgaged property was determined, that the property just described, and which was marked as property No. 1, in the first fact of the aforesaid deed, was liable for the amount of thirty seven thousand dollars of capital, for the interest accruing from this capital, secured by law in prejudice of third parties, and for two thousand dollars for costs. Fifth.
For the purpose of all the acts and proceedings which might
8 arise by virtue of this contract, the parties expressly submitted themselves to the judges of this city, expressly waiving also any other domicile. It so appears more specifically stated in the

aforesaid deed of the 26th of February, 1901, an authentic copy of which is filed herewith under the letter A, recorded in the Registry of Properties, in so far as the property described in the third fact of this complaint is concerned, on folio 245, of Book 30 of Juana Díaz, property No. 1538, 8th registration thereof. Sixth. Don Marcelino Torres Zayas has not paid the four thousand six hundred dollars ($4,600.00) of the instalments of interest due on the 21st of February, of the present year 1904. Seventh. The mortgage credit above referred to has not been cancelled in the register of property, nor is there any entry in the Journal showing the filing of any document for the cancellation thereof; the property described, according to the Register has not been transmitted to any third person, nor has any mortgage been constituted upon the same, other than that in favor of Mr. Lothrop, which is the object of this suit. So it appears from the certificate issued by the register of property, on the twenty third of the present month and filed herewith under the letter B."

Such are, literally transcribed, all the facts stated by Mr. Lothrop in his writing or complaint instituting against the debtor Torres Zayas the proceeding for the foreclosure of mortgages. Mr. Lothrop filed with the said complaint two documents: One marked with the letter A, which is the same deed referred to in the first allegation of this complaint, and the other marked with the letter B, which was a certificate of the registrar of property showing that the mort-

9 gaged property had not been sold, nor the mortgage cancelled, and that the cancellation thereof was not pending in the registry.

In the same complaint, the facts of which have been transcribed, the plaintiff therewith, Mr. Lothrop, then goes on and states the legal grounds thereof, and concludes by making to the court the following prayer, which literally copied, reads as follows:

"I pray the court to please consider me as the legal representative of Mr. William Sturgis Hooper Lothrop, and to direct that the debtor Don Marcelino Torres y Zayas, be required to make payment within 30 days of the aforesaid amount of four thousand six hundred dollars ($4600.00) of interest due up to the 21st of February last, and of those which at the legal rate should be due thereon up to the date on which payment be made, and to pay the costs, and to warn him that in case he fails to do so the mortgaged property will be sold at auction to secure the payment of said liabilities."

The aforesaid suit brought by Mr. Lothrop, and the documents marked with the letters A and B, referred to therein, were filed in the District Court for the judicial district of Ponce, on the 3rd day of May, 1904. But the eight notes referred to in the deed were not filed with the complaint nor was any other document filed therewith. Nor were said notes produced at any time during the whole course of the said foreclosure proceeding up to the termination thereof.

On the same day, the 3rd of May, 1904, the District Court of Ponce, by virtue of the foreclosure proceeding brought by Mr. Lothrop, issued a writ against Mr. Torres Zayas, who was the only

defendant in said proceeding, the mandatory precept of which literally reads:

"It is directed that Don Marcelino Torres Zayas, a resi-
10 dent of Juana Díaz or any other person who may be legally in charge of the property mortgaged, be required to make payment to the creditor, the plaintiff Mr. William Sturgis Hooper Lothrop, or to his legal representatives in this city, within 30 days, of the sum of four thousand six hundred dollars which he is owing the latter as interest due up to the 21st of February last, and of those which, at the legal rate may become due on said amount up to the moment of making the payment, and to pay the costs, and to warn him that in case he fails to do so the property mortgaged will be sold at auction to secure the payment of said liabilities. And for the proper return of this writ, an order shall be issued to the Municipal Court of Juana Díaz, in accordance with the further prayer of the petition. The Presiding Judge of this Court, Don Isidoro Soto Nussa, is appointed as Examining Judge (Juez Instructor) for this cause. It was agreed upon and signed by the Judges of this Court; and attested by me.—Isidoro Soto Nussa.—R. Sanchez Montalvo.—H. S. Belaval.—Luis Gautier."

It was stated by the said Court of Ponce, in said writ, that the same was issued upon consideration of the facts stated in the complaint filed by Mr. Lothrop, wherein the latter stated that he bound himself to pay whatever damages might accrue to the debtor Torres Zayas caused by any malice or negligence incurred in the faithful statement of the facts contained in his complaint (Mr. Lothrop's); but he did not bind himself in the same manner with regard to the other circumstances which the court should have taken into consideration so as to authorize the proceeding and entertain the same.

The aforesaid writ of the Court of Ponce, of the third of
11 May 1904, on which date the said court was composed of three judges, was subscribed only by two of the judges of the court.

In furtherance of the aforesaid writ of the 3rd of May 1904, the marshal of the court of Ponce required Don Marcelino Torres Zayas, in the form directed in said writ to make said payment; but the co-owner of the land, Da. Mercedes Laborde, was not so required, nor was she ever notified with regard to said proceeding. A copy of said complaint was not delivered, either, to Don Marcelino Torres, nor to any other person on his behalf; nor was the said Torres, or his wife, required to pay any amount whatsoever after the auction sale had taken place, nor was any order or summons of the court served on them during the whole course of said proceeding, with the single exception of the writ issued when the proceeding was instituted, which was served on Mr. Torres, as stated in the foregoing allegation.

After the thirty days given to Mr. Torres Zayas, to make the payment, had elapsed, the court of Ponce, on motion of Mr. Lothrop's counsel, made an order directing the property mortgaged to be sold at public auction for failure of Mr. Torres Zayas to make the payment of the sum claimed by his creditor (then plaintiff) Mr.

Lothrop, within the thirty days given him for such purpose. But this order of the court of Ponce, which appears to have been made on the sixteenth of June of the said year nineteen hundred and four, was authorized and subscribed only by two of the judges of said court, which, at that time, was composed of three judges.

6th. That on the nineteenth of July nineteen hundred and four, the District Court of Ponce made an order directing that execution should be issued in accordance with the writ of the third of May, 1904. And although this writ did not provide for the attachment of the properties, nor the sale thereof at public auction (as it only required the debtor to make payment) nevertheless the mar-
12 shal of the said court of Ponce, without proper order therefor, attached the properties mortgaged of Mr. Torres Zayas, on the 30th of July, 1904, without appearing on the place where they are situated, and then proceeded to sell them at public auction.

In pursuance of the said auction, notices were published in the local paper "The Porto Rico Eagle." A notice was published, for the first time, on the 24th of August, 1904; the second time, on the 31st of the same month and year; the third time, on the 7th day of September of said year; and the fourth, and last time, on the 14th of September, of said year 1904. The auction sale took place on the twelfth of September 1904, that is to say, two days prior to the publication of the last notice. Therefore the notices were published only during the term of twenty days, and the sale took place eighteen days after the publication of the first notice.

The valuation given to the property in said mortgage was not stated in said notices, so that said valuation should be taken as basis for the sale, nor was said valuation taken into consideration for the purpose of the same, nor were the bidders required to pay ten per cent of said valuation. So that the property was sold at first auction without subjection to any rate of valuation.

7th. That on the same day, the 12th of September, 1904, the secretary of the court, after the auction sale had taken place, accepted the offer of the defendant herein Don Pedro Juan Rosaly, for the amount of five hundred dollars, plus the cost of the proceeding, and his obligation to pay the mortgage then constituted upon the property, and said secretary issued a certificate in his favor as title for the Registry of Property; that the return of the marshal shows that the sale was made without objection to any rate of valuation and that it was made on the 18th day after the publication
13 of the first notice, all of which is contrary to law, that the property named "Semil" had a value at that time of one hundred thousand dollars, and that plaintiff was greatly damaged by reason of the said sale of his property for the sum of five hundred dollars.

8th. That afterwards, and without any order of the court of Ponce, the marshal thereof, on the seventh of October, 1905, executed a deed of the property mortgaged and sold, in favor of the defendant Don Pedro Juan Rosaly y Capó, before Don J. Fernandez Corona, a notary public of Ponce; and on the same date, and before the same notary, the defendant Mr. Rosaly Capó constituted a mortgage upon the said property for the sum of thirty thousand dollars

in favor of the mercantile partnership of this city "Lothrop Luce & Co.", who are also defendants in this suit, and the aforesaid deeds have been recorded in the registry of property of Ponce.

9th. That the defendant Mr. Rosaly as well as all the partners of the mercantile partnership Lothrop Luce & Co. had personal knowledge of the facts stated in this complaint, including the fact that the interest due had been paid on, and before the institution of the foreclosure proceeding of said mortgage. That the nullity of, as well as the defects contained in, the title of the judicial sale made in favor of Mr. Rosaly clearly appeared in the registry of property of the District, at the time when Mr. Rosaly constituted the mortgage in favor of the mercantile partnership Lothrop Luce & Co. That Mr. Rosaly, although appearing as purchaser of the property "Semil" and although he had the same recorded in his own name, was actually nothing more than an agent of the plaintiff William Sturgis Lothrop for the purpose of such sale and that the property from the date of said sale actually belonged to William
14 Sturgis Lothrop, and the same actually belongs now to Da. Alice Lothrop, successor to and heiress of William Sturgis Lothrop, always subject to the right of the plaintiff in this suit. And Lothrop Luce & Co., which appears as mortgage creditor with regard to this property, are also nothing more than agents of Mr. William Sturgis Lothrop, who was a partner of the said mercantile partnership, the latter holding said mortgage in trust for Doña Alice Lothrop, successor to and only heiress of William Sturgis Lothrop.

10th. That the plaintiff Marcelino Torres was on the 26th of February, 1901, and still is, the owner of the property "Semil", which belongs to him as a matter of right, although the same appears to be recorded in favor of Don Pedro Juan Rosaly, and is in the possession of the defendants.

11th. That Mr. William Sturgis Lothrop died in the year 1906, his sole heiress being his widow, the defendant Alice Lothrop.

And by virtue of the foregoing allegations, the plaintiffs

Pray- this Hon. Court to render judgment in this suit declaring the law and the facts to be in favor of the plaintiffs and against the defendants, and making further the following declarations:

I. Holding that Don Marcelino Torres Zayas was not bound to pay on the 3rd day of May, 1904, four thousand six hundred dollars as interest due on the 26th of February of the said year 1904; and that notwithstanding, the said Mr. Torres Zayas, on the 3rd day of May 1904, had paid to his creditor Mr. William Sturgis Hooper Lothrop, the aforesaid four thousand six hundred dollars; and that, therefore, the said Mr. Lothrop lacked any right whatsoever to institute on the 3rd day of May, 1904, the fore-
15 closure proceeding hereinabove referred to, which he instituted on said date and carried on afterwards; and that there was malice and negligence in the statement of facts made in the complaint filed in this court by Mr. Lothrop against Mr. Torres Zayas on the said day, the 3rd of May, 1904.

II. Holding that all orders made by the court, all writs issued by the secretary, and all services and returns made by the marshal

and sheriff of the District Court for the Judicial District of Ponce, during the course of the foreclosure proceedings brought by Mr. William Sturgis Hooper Lothrop against Don Marcelino Torres Zayas, which was instituted with the filing of the complaint on the 3rd of May, 1904, which proceeding and complaint have been referred to in the allegations herein made, are null and void and without any effect whatsoever;

III. Holding that the whole of the said foreclosure proceeding is null and void from the beginning up to the termination thereof.

IV. Holding that the certificate issued by the marshal of the court of Ponce in favor of Don Pedro Juan Rosaly, on the twelfth day of September 1904, when the auction sale of the property "Semil" took place, whereby the said property was adjudicated to him by the acceptance of the offer made by him in said sale, is null and void, and holding, further, that such sale is null and void.

V. Holding that the deed of judicial sale executed by the marshal of the court of Ponce in favor of Don Pedro Juan Rosaly y Capó on the 7th of October, 1905, before J. Fernandez Corona, a notary public, and the registration of said deed in the registry of property of Ponce, are null and void.

VI. Holding that the mortgage constituted by Don Pedro Juan Rosaly on the 7th of October, 1905, upon the same property "Semil," in favor of Lothrop Luce & Co., before Fernandez Corona, a notary public, and the registration thereof in the registry of property of Ponce, are null and void.

16

VII. Holding that the said property "Semil" belongs to the plaintiff, who is the legitimate owner thereof, and directing him to be put in possession thereof.

VIII. That in case the court should not consider it to be just to decree that the said property "Semil" be returned to the plaintiff, the court is prayed to adjudge and decree that the defendant, or such defendants as the court should deem liable on account of the facts stated in the complaint, pay to the plaintiff the proper value of the aforesaid property, which, at the present time, is not less than eighty thousand dollars.

II.

As second cause of action, the plaintiff alleges:

First. That with regard to all of the allegations made in the first cause of action of this complaint, from number 1 up to number 11, the plaintiff states them again and makes them a part of this second cause of action.

Second. That the said William Sturgis Hooper Lothrop appropriated to himself the crop of one thousand quintals of coffee produced by the property "Semil" during the months of November and December, 1904, and January and February, 1905, the net and liquidated proceeds of which crop after deducting the expenses, amounted to eight thousand dollars.

Furthermore: that the defendant Mr. Rosaly, as agent of William Sturgis Lothrop, appropriated to himself and sold the crop of coffee produced by the said property, which amounted to one thousand and

three hundred quintals of coffee, during ...is of November
and December, 1905, and Janu... ...uary, 1906, the
17 net and liquidated proceeds of sa... ...deducting the
expenses, amounted to ten thousa...

Furthermore: that the defendant Mr. L... ...of William Sturgis Lothrop appropriated to himself, ... coffee crop produced by the said property, which am... ...thousand five hundred quintals, during the months of ...d December 1906, and January and February, 1907, ...liquidated proceeds of said crop, after deducting the e... ...nted to twelve thousand dollars.

And by virtue of the foregoing allegations, t...

Prays this Hon. Court to render judgment in ...laring the law and the facts to be in favor of the plaint... ...t the defendants, and holding as follows:

1st. Directing Doña Alice Lothrop, as heiress of W... ...gis Lothrop, to pay over to the plaintiff the eight th... ...rs, amount of the proceeds of the coffee crop of the afo... ...y, during the months of November and December, 1904 ... and February, 1905, and the twenty two thousand dolla... the proceeds of said property during the months of N... December 1905, January and February, 1906, Nov... December, 1906, and January and February, 1907.

2nd. That in case the court should consider it more pr... furtherance of justice, to direct Don Pedro Juan Rosaly ... instead of Da. Alice Lothrop, to pay over to the plaintiff th... two thousand dollars amount of the proceeds of the property ... during the months of November and December, 1905, Janua... February, 1906, November and December 1906, and Januar... February, 1907.

III.

And as third cause of action, the plaintiff alleges:

18 First. That with regard to all of the allegations made in the first cause of action of this complaint, from number 1 up to number 11 the plaintiff states them again and makes them a part of this third cause of action.

Second. That on account of the foregoing facts, the plaintiff has suffered mentally, and has been materially damaged, having been deprived of his property and bound to live with very scarce means, his credit being lost and being compelled to apply himself to hard work so as to support his family, which damages he estimates in the sum of twenty thousand dollars.

And by virtue of the foregoing allegations, the plaintiff

Prays this Hon. Court to render judgment in this suit, declaring the law and the facts to be in favor of the plaintiff and against the defendants, and adjudging as follows:

Directing Doña Alice Lothrop sole heiress of William Sturgis Lothrop, to indemnify the plaintiff in the sum of twenty thousand dollars as damages for the moral sufferings and material loss sus-

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tained by him on account of the facts above stated, and to impose the costs upon the defendants.

BOERMAN & LLORENS,
Counsel for Plaintiff.

Service of the foregoing amended complaint as well as of the exhibit filed therewith accepted on this 15th day of January, 1908.

JOSÉ TOUS SOTO,
Counsel for the Defendants who Appeared.

Filed January 15th, 1908.

F. BARNÉS, *Secretary.*

19 EXHIBIT No. 1.

Total Cancellation and Constitution of a New Mortgage, No. 91.

At the city of Ponce, Island of Porto Rico, this twenty sixth day of February, 1901, before me, Don Rosendo Matienzo Cintrón, attorney-at-law, and a Notary Public, member of the Association of the Province, a resident of this city, with an office in the same, and before the witnesses to be named later on, appear:

Don Marcelino Torres y Zayas, a resident of the town of Juana Díaz, temporarily residing in this city, married, property owner, farmer, and forty three years old.

Don Rafael Collazo y Perez, and Don Antonio Perez Guerra y Goicoechea, both residents of this city, married, property owners, and fifty one and fifty years old respectively.

And Mr. Henry De Ford y Baker, a resident of the city of Boston, U. S. of North America, residing at the present time in the town of Salinas, and a sojourner in this city of Ponce, a merchant and banker, and of age; on account of the ignorance of the latter of the Sanish language, he appears accompanied by Don Pedro Juan Rosaly y Capó, a resident of this city, married, of age, and property owner, who is to act as interpreter.

The foregoing parties state that they appear, the former in his own behalf, the second and third on behalf of the mercantil- partnership doing business in this city under the firm of Collazo Perez Guerra & Co., of which both are the only partners and managers,

with power to use the name of the firm, as appears from the
20 contract executed in this city, by a public deed, before Don Rafael León, a notary public, on the 20th of September, 1877, and of the deeds extending the term of said contract, also executed in this city: the first of said deeds having been executed on the 25th of August, 1879, under No. 355, before Don Joaquín Mayoral, a Notary Public; the second deed was executed on the 28th of July, 1883, under No. 242, before Don Rafael León, a Notary Public, acting as substitute for the Notary Don Joaquín Mayoral; the said deed was executed under No. 219, on the 20th of July, 1889, before the said Don Joaquín Mayoral, Notary Public; the fourth deed was executed

under No. 378, before the said Notary Don Joaquín Mayoral, on the 15th of July, 1893; and the fifth deed was executed under No. 411, before the Notary Don Rafael León, acting as substitute for the undersigned Notary, on the 31st day of May, 1899.—The following quotation is taken from the latter of the aforesaid deeds extending the term of the partnership, the original of which has been shown to me for the purpose of this deed, to wit: "Extension of term of " partnership.—No. 411.—At the city of Ponce island of Porto Rico " this 31st day of May, 1899, before me, Don Rafael León y Paz, " a notary of the Association of the Province, residing in this city " and having his office therein, acting as substitute for the Notary " Don Rosendo Matienzo Cintrón, attorney-at-law, now on leave of " absence; before the witnesses to be named later on, Appear:— " Don Rafael Collazo y Perez, a resident of this city, married, a mer- " chant and fifty years old.—And Don Antonio Perez Guerra y " Goicoechea, also a resident of this city, married, a merchant and " forty seven years old.—I certify with regard to the personal knowl- " edge, professions and residences of the parties appearing herein,
" who assure me to be in the full enjoyment and exercise of
21 " their civil rights; and having, in my opinion, sufficient
" legal capacity for the execution of this deed, state the fol- " lowing facts:—Then follow a statement of facts and afterwards " the following clauses:—First.—The partnership will continue " doing business in this city under the firm name of Collazo Perez " Guerra & Co., which the partnership has been using since its con- " stitution, and shall carry on the same business done by said part- " nership up to the present time, that is, the grocery business at " wholesale and retail, and to the purchase and sale of domestic " fruits, and to exploit and cultivate the lands possessed by said part- " nership.—Second: The appearing parties mutually agree to extend " the term of such partnership for an unlimited period, which will " begin to run from the 28th day of July of the present year, when " the term of the last extension of time agreed upon will expire, but " the partnership may be dissolved upon petition of one of the mem- " bers thereof, at the expiration of one year of the extension of time " hereby agreed. If the partnership goes on doing business after " the expiration of the first year of the extension hereby agreed, it " may be dissolved also upon petition of any of its members, but " the dissolution of the partnership, will take place precisely at the " expiration of any of the successive years in which the petition for " dissolution of the partnership be made.—Third.—The manage- " ment, direction and administration of the partnership, will be, as " usual, in charge of both partners, who, as only owners and man- " agers thereof will have indiscriminately the use of the firm of the " partnership for the purpose of all transactions and business thereof, " but not for the purpose of furnishing bonds or securities of any " kind without previously agreeing with regard thereto.—Then fol-
" lows others clauses and the deed concludes as follows:
22 "The deed having been read by the same in exercise of
" their rights, and in the presence of the witnesses Don " Felix Tarascó and Don José Cuevas, both residents of this city

"and personally known to me, the parties approve and ratify the "same in all its parts, and sign the same as well as the witnesses, "before me, the undersigned notary who certifies with regard to "all the facts stated in the present deed.

"RAFAEL COLLAZO.
"A. PEREZ GUERRA.
"FELIX TARASCÓ.
"JOSÉ CUEVAS.
"There is a Rubric."

"(Signed) RAFAEL LEON.

The foregoing is a faithful transcription of the proper part of the original thereof, to which I hereby refer, and with regard to which the parties assure me that proper notice has been taken in the Commercial Registry of this city.

And the fourth party, that is to say, Mr. De Ford, appears on behalf of Mr. William Sturgis Hooper Lothrop, a resident of the city of Boston, state of Massachusetts, married, a merchant and of age, by virtue of the general power of attorney conferred on him on the 14th of March, 1899, signed and ratified on the same day before the Notary of the said city of Boston, Mr. Robert T. Wesvick; the original of said power-of-attorney which has been shown to me, appears to be written in the English language, and for that reason a translation thereof into the Spanish language has been produced, which literally copied reads as follows: "Know all men by these "presents:—That I, William Sturgis Hooper Lothrop, of Boston, "state of Massachusetts, United States of America, hereby constitute "and appoint Henry De Ford, until very recently a resident of the "said city of Boston, and now residing in Porto Rico, to be my true "and legal attorney-in-fact, to have in my representation and behalf "a complete and full administration and disposition of my real and "personal property, matters and properties of any kind and
23 "nature, wherever the same might be found and to do, "execute, grant, receive, deliver, sell, mortgage, pledge, loan, "convey, transfer, pay and receive and execute, all and every acts, "documents, writings, moneys, properties, real and personal prop-"erties, rights and privileges, and interests of whatever kind and "nature as if done, executed, granted, received, delivered, sold, "pignorated, conveyed, transferred, paid or received by myself; to "sign on my behalf and representation, all and every document "necessary to be signed and of whatever nature; to make contracts "and contract obligations and to pay them, including particularly "notes and negotiable papers and bills of exchange; to bring and "demand before the court, and to defend therein all matters and "suits necessary to be brought and defended, and to act in this line "and in any other line, in my behalf and representation, in all "occasions and for all purposes, as fully and effectively as if I were "personally present in the execution of said acts and acting by "myself. Although I have intended to include in the foregoing "all power that I may confer or delegate, I expressly confer unto

" my said attorney full power and authorization to do in my name
" and representation all acts, execute and deliver all and every docu-
" ment and deed which may be necessary or proper, including par-
" ticularly the execution of mortgages, transfer or discharge of
" mortgages upon lands, and transfer or lease of such properties and
" all other acts which may be necessary for the better administration
" thereof, and also to receive and execute receipts and sell all my
" personal effects, transfer to third persons, of whatever kind and
" nature, which might belong to me, particularly and expressly in-
" cluding stocks, bonds, vested rights, government bonds, bills of
" deposits and certificates, or deeds of property, which I now
24 " possess or may possess while this power is in force, as well
" as to do all and any kind of subscription in my name and
" representation, which I may have to do by reason of having or
" possessing financial share in stocks, coupons, certificates or deeds
" of property, government bonds, vested rights, receipts of deposits,
" or any other personal property which I possess, expressly including
" hereby the rights to subscribe to any issue of stock which I may
" have a right to subscribe by vested rights, with full power to execute
" personally the payment of said subscription; also to collect and
" issue receipts for all the amounts or moneys, dividends or property
" of whatever kind and nature, expressly including the right to
" indorse registered bonds and coupons, in my name, for the col-
" lection or transfer thereof.—Also to receive and issue receipts of all
" property which now belongs to me or may belong to me, and which
" may be given, deposited or held as collateral security for the pay-
" ment of any notes or any other obligation constituted by me, as
" well as to substitute any property belonging to me which he may
" have in his power as he may see fit; with full power to place the
" substituted property under the same conditions stated in said obli-
" gation. And at the same time with full power and authority to
" carry on in my name and representation the banking business in
" all regards, including to make and renew loans on the conditions
" and rate of interest, with or without security, according to the
" opinion of my said attorney, with full power to accept and receive
" in my name, issue receipts in the same manner, sell, change and
" deliver the collateral securities or any other which may come into
" his hands in the course of said banking business.—And at the
" same time the right to endorse and sign in my name, and
" bind me personally as well as my property as far as
25 " it may be necessary and proper for the purposes of this
" power and with the rights to execute all the acts which may
" be necessary to do, in my representation, although not expressly
" authorized in the foregoing.—It being my will to have my said
" attorney act as fully and effectively as if I were personally pres-
" ent.—And so as I am attorney-in-fact for any other person or
" persons, I hereby appoint the said Henry De Ford my substitute
" for every and all power which I have or may have and I transfer
" and delegate unto him all of said powers with regard to the exercise
" or proper exercise thereof in the island of Porto Rico.—This power
" will be in force up to September 1st, 1903.—In testimony whereof

"I hereunto affix my hand and seal at Boston, Massachusetts, "United States of America, on this 14th day of March, 1899.— "(Signed) William Sturgis Hooper Lothrop.—There is a seal.— "State of Massachusetts.—Boston March 14th, 1899.—County of "Suffolk.—Before me appear the above mentioned William S. Lo- "throp of whom I certify to be the person who executed the fore- "going document, and signed the same before me, declaring that he "executed the same freely and voluntarily.—Before me.—Signed.— "Robert F. Herrick.—Notary Public.—There is a seal. Attesta- "tion.—Joseph A. Villard, of Boston, in said county, duly elected "and constituted as clerk of the Superior Court, for and within the "said County and State, residing at Boston, in the said County, the "said Court being a court of record, with a seal hereunto affixed, "and in furtherance of my duty as clerk aforesaid, I certify and "attest: That Robert F. Herrick, before whom the attached execu- "tion, proof or deed was taken and subscribed, is a notary public, "for and including all the State and has authority to execute and
"take agreements, proofs and deeds in all the counties of
26 "the said State and to act as such; and being also authorized
"to take executions and certify proofs and deeds of convey- "ances of lands, buildings, and hereditaments, existing within the "said State, in any part thereof wherever they may be situated, "and that he was, at the time of making the execution, proof or "deed, hereto attached a notary public, that proper faith and credit "are and should be given to his official acts; that I am well ac- "quainted with his signature and handwriting and truly believe "that the signature fixed to the aforesaid attached deed is genuine, "and further, that said power is made and executed according to "the laws of the State.—Given under my hand and the seal of said "court at Boston, the said County and State, on this 14th day of "March, 1899.—Signed.—Joseph A. Villard.—There are two seals "affixed thereon."

The foregoing is a true and faithful copy of the original thereof, to which I hereby refer, and which has been returned to Mr. De Ford, who assures me that said power of attorney has not been revoked, suspended or limited in any way whatsoever, but, on the contrary, it has been ratified by instructions recently received by him from his principal.

I hereby certify with regard to the personal knowledge, profession and residence of the parties appearing herein, who assure me to be in the full enjoyment and exercise of their civil rights; and having, in my opinion, all of them, sufficient legal capacity for the execution of this instrument, they state the following facts:

First. Property: That the contracting party herein, Don Marcelino Torres y Zayas, is owner in full ownership of two real properties described as follows:

Number one. A coffee plantation named "El Semil," situated
in the ward of Villalba-arriba, in the Municipal jurisdiction
27 of Juana Diaz, covering an area of five hundred and thirty
five cuerdas and sixteen hundredths, equivalent to two hundred and ten hectares fifty three ares and ninety two centiares,

having at the present time the following establishments thereon: a wooden dwelling house, covered with zinc; another house of the same construction for a store; a wooden ware-house, covered with zinc, for the storage of fruits with special arrangements for the drying thereof, on the ground floor; a hulling-machine for coffee; a shed for laborers and twelve small wooden-houses covered with zinc, as dwellings for the laborers' families. The said property is bounded on the North by a public road and by lands belonging to Juan Felix Baez, Socorro García and to the Succession of Don Severo Segarra; on the East, by lands belonging to Don Domingo Olivieri, Succession of Catalina Matos, Lucas Negrón, Julian Negrón, to the said Don Domingo Olivieri, to the succession of Juan Angel Rosario, to Tomasa Negrón, and José Torres; on the South, by land belonging to Don José Genaro Rivera, Don José del Carmen and Da. Dominga Negrón, to Don Marcial Serrallés, Eduvigis Rodriguez, Ramón Sanchez, Pedro Morales and to Don Antonio Santí; and on the West, by a public road and lands belonging to Don Juan Zaragoza, Don José del Carmen Negrón and to the succession of Don Severo Segarra.

And number two: Land without any denomination, situated in the same ward of Villalba-arriba, in the Municipal jurisdiction of Juana Díaz, covering an area of sixty three cuerdas and sixteen hundredths, equivalent to twenty four hectares, eighty two ares and forty three centiares, which land is partly planted with coffee and the remainder with pasture and briers, having at the present time only a wooden warehouse covered with zinc with special arrangements for the drying of fruits, and a house of the same construction used as a store. This property is bounded on
28 the North by land of the succession of Simón Alvarado, Liberata Olivencia and Ramón Zayas; on the South, by lands of the succession of Andrés Negrón; on the East, by lands of the succession of Juan Ramón Rodriguez and the succession of Luciano Torres; and on the West, by the brook named Semil, and lands of Dolores Torres.

Second. Title: That the two properties above described were acquired by the party, the said Mr. Torres y Zayas, by virtue of an adjudication made in his favor in payment of a mortgage credit of fifty thousand dollars and in payment of another chattel mortgage of four thousand five hundred and thirty four dollars and fourteen cents, which adjudication was made to him by Messrs. Collazo Perez Guerra and Co., merchants of this city, by a public deed number 90, executed before the undersigned attorney, in this city and under this date, the original of which I have before me for the purpose of this instrument, which deed has not yet been recorded in the Registry of Property of the District, on account of the lack of sufficient time to file the same therein, but the said Mr. Torres Zayas binds himself to comply with that requirement before the present deed is filed for registration in said office.

Third. Property: That Messrs. Collazo, Perez Guerra & Co. are in turn legitimate owners of the property described as follows: Land (named "Monserrate") situated in the ward of "Maraguez",

within this Municipal jurisdiction, covering an area of three hundred and ninety cuerdas, of pasture, briers and mountain lands, equivalent to one hundred and fifty three hectares, twenty eight ares and fifty three centiares, with a wooden dwelling-house covered with zinc, a wooden ware-house covered with galvanized iron, and two houses for laborers. This property is bounded on the North by lands of José Suarez Don Francisco Fournier, Don
29 Amadeo Acosta, Don Manuel Suarez, the succession Vazquez and Antolino 2do.; on the East, by lands of Don Ramón Albisu, Don José Ma. Ramirez, Don Francisco Rubert, succession of Don José Ma. Rodriguez, and Don Guillermo Fournier; on the South, by lands now belonging to Don Juan Fournier; and on the West, by lands belonging to Don Francisco Fournier, Don Juan E. Rivera and Don Santos Rosa.

Fourth. Title: That the property lately described was acquired by the aforesaid partnership by purchase of two different portions thereof:

One to Don Joaquín Alce y Goicoechea and the other to Don Guillermo Fournier y Toro, as shown by the deed executed in this city before Don Joaquín Mayoral, who was a notary public of said city, on the sixth day of April, eighteen hundred eighty nine, which document was recorded in the Registry of Property of the District, with regard to the merger in one property of the two portions acquired thereby, on folio 29 of Book 53, of this Municipality, property No. 2453, 1st. registration thereof.

Fifth. Burdens: That from the titles which have been produced as well as from the statements made by the contracting parties, it appears that the property named "Monserrate", described in the foregoing third fact, is free from all mortgages, census, and encumbrances; but with regard to the other two properties described in the first fact, the following mortgage has been constituted thereon: By a deed No. 625, executed before the undersigned notary, in this city, on the 21st of November, 1898, Mr. William Sturgis Hooper Lothrop, a resident of Boston, made a loan to Messrs. Collazo Perez Guerra and Co. for the amount of forty thousand dollars, U. S. currency, for the term of four years to be due on the 21st of November, 1902, and at the annual rate of interest of
30 ten per cent, which amounts the debtors bound themselves to pay to the creditors, in American money, or the equivalent thereof, in any other legal currency in this island, as follows: One thousand dollars on the twenty first of February of last year 1899; four thousand dollars on the same date and month of each of the ensuing years 1900, 1901, and 1902, and three thousand dollars on the 21st of November, of the same year "nineteen hundred", which is the date when said mortgage becomes due, which mortgage was extended for such amount as was necessary to cover and secure the interest, for such term as allowed by law to the prejudice of third parties, and to cover two thousand dollars more, U. S. Currency, for costs and judicial expenses in case of foreclosure; the liability of the property described under No. 1 being fixed at thirty six thousand dollars, U. S. currency of principal, and made to

cover the interest of the whole principal and one thousand dollars for costs; and that of the property described under No. 2 was fixed at four thousand dollars U. S. Cy. of principal and made to cover the remaining one thousand dollars for costs. So it appears from the deed of the aforesaid mortgage the original of which has been shown to me for the purpose of this instrument; but a copy thereof, as stated by the contracting parties, has been recorded in proper time in the Registry of Property of the District. Inasmuch as the aforesaid mortgage is to be cancelled by the present deed, the above mentioned properties described under numbers one and two, will be thereby free from all mortgages, census and encumbrances.

Sixth. Value: That the contracting parties have mutually agreed, in the character under which they appear, to fix the value of said properties, for the purpose of this contract, in the sum of fifty one thousand dollars, that is to say: the value of the property
31 described in the first fact under No. 1, is fixed at Forty thousand dollars; that of the property described in the said first fact under No. 2, is fixed at six thousand dollars; and that of the property described in the third fact is fixed at five thousand dollars; the parties expressly waiving whatever rights they may have to make a new valuation or whatever action they may have with regard thereto.

Seventh. That Don Marcelino Torres y Zayas, having acquired the two properties described in the first fact under Nos. one and two, with the obligation to pay to Mr. William Sturgis Hooper Lothrop the mortgage constituted thereon in favor of the latter, and which mortgage amounts at the present time, together with the interest unpaid and due thereon, to the sum of forty six thousand dollars and the said Torres Zayas, being unable to pay said amount and the interest which may become due thereon, at the expiration of the instalment stipulated, the contracting parties have agreed, that Mr. De Ford y Baker, in the character under which he appears herein, shall allow Mr. Torres a longer term for the payment of said amount, at the same rate of interest of 10%, and with the security of a first mortgage upon the two properties now liable for the said credit, and besides upon the real estate named "Monserrate", described in the third fact, which is the property of Messrs. Collazo Perez Guerra & Co., the latter agreeing thereto in order that Mr. Torres may be granted a longer time for the payment of the said obligation.

And inasmuch as the said agreement modifies almost entirely the aforesaid mortgage, they have agreed to totally cancel the same and to constitute a new mortgage for the aforesaid amount of forty six thousand dollars for the term, at the rate of interest, and under the conditions to be stipulated later on and with the security above mentioned.

32 And in order to carry out the aforesaid agreement and to make the same in an authentic form and give it proper legal effect, the contracting parties execute the present deed, under the following clauses:

Total Cancellation.

First. The contracting party Mr. Henry De Ford y Baker, in the name and representation of his principal Mr. William Sturgis Hooper Lothrop, by virtue of the aforesaid agreement and without having received the forty six thousand dollars which for principal and interest the other contracting party, Don Marcelino Torres y Zayas, is owing to his principal, on account of the voluntary mortgage constituted by the deed referred to in the fifth fact, and dated the twenty first of November, 1898, and on account of the purchase made by him of the two mortgaged properties, and in order to include the amount thereof in the new mortgage which is to be constituted, agrees to consider hereby extinguished and properly cancelled the aforesaid mortgage of the twenty first of November, 1898, agreeing and consenting also to the proper cancellation of the registration made with regard thereto in the Registry of property of the District, in whatever legal form may be proper.

Voluntary Mortgage.

Second. Don Marcelino Torres y Zayas declares and admits that he owes to Mr. William Sturgis Hooper Lothrop the amount of forty six thousand dollars, on account of the mortgage which has been cancelled by the foregoing clause, and for the amount of which he hereby gives proper receipts in favor of his creditor. Thereupon.

I, the undersigned notary warn him that he cannot make any
33 exception whatever against the said admission, and that the properties to be mortgaged will remain liable and subject to the obligation of this contract, and the mortgage credit will be free from all liabilities even if it should be shown later on that the admission of said debt was not true either in whole or in part.

Third. This mortgage is constituted for such a term as, counted from to-day, will become due on the 21st of February, in the year 1905.

Fourth. The capital owed will bear interest, from this day up to the final and total payment thereof at the annual rate of ten per cent which the debtor will pay to the creditor on the 21st of February of each year, without failure, excuse or pretext whatsoever.

Fifth. The forty six thousand dollars, amount of the principal owed, shall be paid by Don Marcelino Torres Zayas, in this city of Ponce, to the creditor Mr. William Sturgis Hooper Lothrop, or to his legal representatives, on the aforesaid date of the 21st of February in the year 1905.

Sixth. In case a cyclone or any other unforeseen event should occur the decision with regard to the payment of the principal and interest thereon at the expiration of the installments agreed upon, shall be submitted to the judgment of amicable compounders to be appointed one by each party, and the two so appointed shall elect another in case of disagreement.

Seventh. It is agreed that the forty six thousand dollars, amount of the principal of this mortgage, will be represented by eight notes, to be made in favor and to the order of the creditor and for the

amount of five thousand seven hundred and fifty dollars each, bearing interest at the rate of ten per cent per annum, and to become due all of them on the 21st of February 1905, which is the
34 date of the expiration of this mortgage.

Eighth. The creditor is given the power to inspect, either by himself or through agents, the properties described under Nos. One and Two, whenever he should see fit to do so, in order to determine if they are kept in good condition of cultivation.

Ninth. The contracting parties agree that all the produce of the two properties firstly described shall be delivered to Messrs. De Ford & Co. of this city to be sold by them at the highest price that can be obtained in this market, so as to deduct from the value of said produce the amount of the interest which shall be paid annually to the creditor, and the balance, if any, shall be delivered to the debtor Mr. Torres Zayas, for the expenses and maintenance of the said properties, the latter being bound to apply to the payment of the principal of the debt such sum as may exceed the amount of said expenses.

Tenth. All kinds of taxes which may be imposed upon the principal and interest thereon, while this mortgage remains in force, shall be for the exclusive account, charge and risk of the debtor, Mr. Torres y Zayas, who shall pay also the expenses which may be incurred on account of this deed, the copy thereof and the registration of the same in the registry of property of the District, as well as those which may be caused by the partial or total cancellation thereof, when the same shall be made.

Eleventh. In order to guarantee the payment of the forty six thousand dollars owed, the contracting parties, Don Marcelino Torres Zayas, in his own right, and Don Rafael Collazo y Perez, and Don Antonio Perez Guerra y Goicoechea, in the name and representation of the partnership Collazo Perez Guerra and Company, constitute a first and voluntary mortgage, for the aforesaid amount, in
35 favor of the creditor Mr. William Sturgis Hooper Lothrop, the former upon his two properties described in the first fact under numbers One and Two, with all their appurtenances; and the second and third upon the estate "Monserrate," which has been described in the foregoing third fact, including also all the appurtenances thereof; the said mortgage being extended for such amounts as may be necessary to cover and secure the payment of the interest stipulated thereon, for such term as allowed by law to the prejudice of third parties, and to three thousand dollars more for costs and judicial expenses in case of foreclosure; and the said property will be subject to this burden until this mortgage shall be totally cancelled. It is agreed that the property described in the first fact under No. One shall be liable for the amount of thirty seven thousand dollars of principal for the interest of the whole principal up to the amount allowed by law to the prejudice of third parties, and for two thousand dollars for costs; the property described under No. Two, in the aforesaid first fact, shall be liable for the amount of four thousand dollars of capital and for the remaining one thousand dollars allowed to cover the costs; and the estate "Monserrate" described in

the first fact shall be liable for five thousand dollars, which is the balance of the capital owed.

Twelfth. The contracting parties, in the character under which they appear, designate this city and expressly submit themselves to the judges and courts thereof for all acts and proceedings which may be originated by reason of this deed, waiving whatever rights they may have by virtue of any other domicile.

Thirteenth. The contracting parties Don Marcelino Torres y Zayas, in his own right and Mr. Henry De Ford y Baker, in the
36 character under which he appears, perfectly acquainted with the contents of this deed and in so far as their respective interests therein are concerned, accept this deed in all its parts inasmuch as the same is in full accord with their own agreement.

And finally, I, the undersigned notary, inform the parties herein that although they have a right to stipulate the interest on the mortgage without subjection to any legal rate, the only interest secured thereby are those stipulated in the present deed and those which may be mentioned in the registration thereof in the registry of property of the district, and the creditor can only demand, by a real action derived from his mortgage to the prejudice of said parties, the interest which may be due for the two years last past and such parts as may be due for the current year, although he shall have a right to bring a personal action against his debtor to require payment of such interest as may be due for the years prior thereto, and to demand, in a proper case, that the mortgage be extended or enlarged to cover proper interest.

That each of the properties mortgaged is only liable to the prejudice of third parties for the amounts respectively assigned to them, but the creditor shall have a right to proceed against any of them to recover the difference in case any of such properties should not satisfy the total of the debt assigned to the same, where no prejudice to third parties may be caused thereby, all in accordance with the mortgage law now in force.

That in favor of the state, the province, and the municipality of Juana Díaz and of this city, a preferred legal mortgage over that of any other creditor is constituted for such amount as may be necessary to secure the payment of an annual tax upon the proper-
37 ties, which has become due and has not been paid.

And that the present deed shall be recorded in the registry of property of the district, otherwise the same shall not prejudice rights of third parties nor be admitted in any court, council or office of the government, unless in such cases and such manner as may be allowed by law.

Under the foregoing clauses the contracting parties execute the present deed of "total cancellation and constitution of a new mortgage," and bind themselves to keep and comply with the same in proper form.

The contracting parties, Messrs. Torres y Zayas, Collazo y Perez, and Perez Guerra y Goicoechea, having read this deed, and the latter having been translated by Don Pedro Juan Rosaly y Capó into the English language, which is the language known to Mr. De Ford y

Baker who is not acquainted with the Spanish language, all in the presence of the witnesses Don Augusto Jordán and Don Oriol Passarell, residents of this city and personally known to me, the said contracting parties approve and ratify the same in all its parts, and they, and the aforesaid witnesses, sign the same before me, the undersigned notary, who hereby certifies with regard to every fact stated in the present deed.

MARCELINO TORRES.
COLLAZO PEREZ GUERRA & CO.
A. PEREZ GUERRA.
HENRY DE FORD.
E. J. ROSALY.
ORIOL PASSARELL.
AUGUSTO JORDÁN.

(Signed) ROSENDO MATIENZO CINTRÓN.
Attorney at Law.

There is rubric, and an internal revenue stamp of one dollar, properly cancelled, affixed thereto.

NOTE.—On the sixth day of March of the same year I issued a first copy of this deed to Mr. Henry de Ford y Baker, in his character of agent of Mr. William Sturgis Hooper Lothrop, covering fourteen sheets of paper of common use.

Attest:

MATIENZO.

There is a rubric.

38 The foregoing is a true and faithful copy of the original thereof, number 91, to which I hereby refer, which is on file in the protocol of public instruments of the year of its execution, of this Notarial Office now in my charge as substitute of the Notary Matienzo Cintrón, who is now absent.

In witness whereof and by petition of Don Marcelino Torres Zayas, debtor, I hereby issue this copy, which is the first copy issued to him, covering 14 sheets of paper of common use, and hereunto affix my signature and rubric, at Ponce, this 23rd day of April, 1904.

ANGEL ACOSTA.

A true copy.

BOERMAN AND LLORENS.
Counsel for Plaintiff.

39 *Demurrer to the Complaint.*

In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE AND CO., PEDRO JUAN ROSALY, and ALICE LOTHROP.

Action to Obtain the Annulment of a Proceeding to Foreclose a Mortgage, etc.

Demurrer to the Complaint.

Now come, before the Hon. Court, the defendants Lothrop Luce & Co., and Pedro J. Rosaly, by José Tous Soto, their counsel, and as demurrer to the complaint, allege:

First. That the complaint does not state sufficient facts to constitute a cause of action against the defendants now appearing.

Second. That several causes of action have been improperly united. Indeed, the action for annulment of proceeding and judicial sale, affecting only the rights of Rosaly and Mrs. Lothrop, has been improperly united with the action for the annulment of the mortgage constituted by Rosaly in favor of Lothrop Luce & Co., the latter affecting only the right of the contracting parties therein and not those of Mrs. Lothrop, which latter action is originated from a transaction entirely different from that which may give rise to the first cause of action.

The action or actions for damages claimed from Mrs. Lothrop have also been improperly united with the other actions brought in the complaint, inasmuch as the former actions do not affect the rights either of Rosaly, or of Lothrop & Co.

Third. That the actions for damages are barred by the
40 Statute of Limitations, inasmuch as more than one year has elapsed since the cause of action originated according to section 1869 of the Civil Code.

That the actions for the annulment of proceedings are barred by the Statute of Limitations because they have been brought after the termination of the foreclosure proceedings, and because they are brought in prejudice of third parties and after the lapse of one year since the time when the causes of such actions originated; all in accordance with section 37, last paragraph, of the Mortgage Law, section 140 of the Code of Civil Procedure and number 3, paragraph 6th of section 175 of the Rules for the Execution of the Mortgage Law.

JOSÉ TOUS SOTO,
Counsel for the Defendants Now Appearing.

Service accepted on this 23rd day of January, 1908.

BOERMAN AND LLORENS,
Counsel for Plaintiff.

Filed on this 24th day of January, 1908.

F. BARNÉS, *Secretary.*

41 *Decision of the Demurrer to the Complaint.*

In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Demurrer to the Complaint.

As shown by the complaint, it appears that in the year 1901, the plaintiff executed a mortgage deed with regard to the plantation "Semil", in favor of Mr. Lothrop. According to the deed, the interest thereon should be paid on the 26th of February of each year. That the interest due up to the 26th of February, 1904, was duly paid to Mr. Lothrop, that is to say, to his legal representative Messrs. De Ford & Co. That Mr. Lothrop brought the foreclosure proceedings to collect his mortgage on May 1904, alleging failure of payment of the interest due thereon. That several irregularities occurred in the foreclosure proceedings. That the defendant Rosaly had knowledge of the fact that all interest due had been paid; and that notwithstanding said knowledge he purchased the estate at public auction.

In the opinion of the court, the irregularities occurring in the proceedings lack importance. It has not been alleged that such irregularities have caused damages to the plaintiff; and it seems that the latter is now in the same condition as he would be if the foreclosure proceedings should have been followed strictly in accordance with the rules of civil procedure. As a result of the proceedings, the plaintiff lost the possession of the property; but the same thing would have happened, if no irregularities had
42 occurred therein. Still the complaint states sufficient facts to constitute a cause of action. If the interest due on the 26th of February, 1904, was truly and actually paid to Mr. Lothrop or his representatives; if Mr. Lothrop had knowledge thereof, or had the duty to have such knowledge; and if Mr. Rosaly purchased the estate at public auction knowing that said interest had been paid, there is a perfect cause of action. The case comes under the decision rendered by the Supreme Court of Porto Rico in the case of Gimenez vs. Brenes, vol. 3, Castro's reports, page 75. It is plain and undeniable that a mortgage creditor cannot foreclose a mortgage knowing that no failure in the payment of interest has been incurred. Nor the title given to the purchaser at a judicial sale would be valid, if the latter knows that the debtor has not failed to make proper payment of said interest.

The allegation that the members of the partnership Messrs. Lothrop Luce & Co. had personal knowledge of the fact that the interest due has been paid is of great importance to determine their rights. If such allegation is true, and if the allegation made with regard to the defendant Rosaly is also true, the deed executed by

the latter in favor of Lothrop Luce & Co. is null and void. If the allegation made with regard to Lothrop Luce & Co. is not true, every possible protection will be afforded to said gentlemen.

In short, the complaint states sufficient facts to constitute a cause of action against the defendants Rosaly and Lothrop, Luce & Co. The second and third causes of action, stated in the complaint, have connection only with the manner of determining the damages. The allegations therein stated are not of importance at the present time, and may be discussed when the time to determine such damages arrives. In short:—the demurrer for insuf-
43 ficiency is dismissed. And the court notifies the defendant Rosaly that he should file an answer admitting or denying the payment of interest due on the 26th of February, 1904; and admitting or denying his personal knowledge with regard to said payment; and setting out, also, any other defense allowed by law. The defendants Lothrop Luce & Co. should file a proper answer. Said answer should be filed within ten days from this date. The costs of the demurrer are hereby imposed upon the defendants.

Ponce, P. R. February 10th, 1908.

MARTIN E. GILL,
District Judge.

44 *Answer.*

In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Annulment of a Foreclosure Proceeding, etc.

Answer.

Now come before the Hon. Court, the defendants Lothrop Luce & Co. and Pedro J. Rosaly, by José Tous Soto, their counsel, and as answer allege:

With regard to the first cause of action:

First defense. The complaint does not contain sufficient facts to constitute a cause of action against the defendants now appearing.

Second defense. Specific denial.

First. We accept the correlative fact of the complaint.

Second. We deny the correlative fact of the complaint, though we accept that payments were made on the 26th of February, 1902 and 1903, as stated therein.

Third. We deny the correlative fact of the complaint, though we accept as true the contents of the Ninth clause referred to therein.

Fourth. We deny the correlative allegation; though we admit that the principal of the mortgage credit was distributed into eight notes to become due on the date stated therein.

Fifth. We deny the correlative fact of the complaint, though we admit that the complaint transcribed therein was filed. Be-
45 sides, we allege in opposition to this fact, that the notices advertising the sale were published in the numbers 803, 809, 815, and 821, of the paper "The Porto Rico Eagle", then published, and which is published now, at the city of Ponce, which numbers refer to the 13th, 20th, and 27th days of August and the 3rd day of September 1904. And that the sale was made for the sum of 37000 dollars (37000 dollars) principal of the mortgage which the purchaser bound himself to pay and 500 dollars in cash. The valuation of the said property "Semil" having been fixed, according to the deed of the constitution of the mortgage in the sum of forty thousand dollars ($40000), and that the purchaser paid the purchase price when the sale was made.

Sixth. We deny the correlative fact of the complaint, and in opposition thereto we allege that neither when the sale was made, nor at any time prior thereto, the property has not been worth more than forty thousand dollars, which was the valuation given to the same.

Seventh. We deny the correlative fact of the complaint, and state anew the foregoing allegation as far as the valuation of the property "Semil" is concerned.

Eighth. We admit the correlative fact of the complaint; but we allege that the marshal acted by virtue of an order of the court directing the sale of the property.

Ninth. We deny the correlative fact of the complaint and allege that the members of the partnership Lothrop Luce & Co., in whose favor the mortgage was constituted, are Mr. John D. H. Luce and Mr. Charles L. Crehore.

Tenth. We deny the correlative fact of the complaint.

Eleventh. We accept the correlative fact of the complaint.

Third defense. We allege as third defense:

First. That by a public deed executed on the 25th of
46 April, 1904, before Don Felipe Casalduc, a notary public, under No. 101, Don Marcelino Torres Zayas and his wife sold in favor of Don Alejandro Alvarado, the property "Semil", for the sum of $50000 to be paid on instalments, and that the said Mr. Alvarado, as such owner thereof, was notified of the judicial sale of said property "Semil" so that he should pay the purchase price for which the same was sold at auction, and liberate the same or to allow that the registration of his ownership be cancelled, if no reason should be shown by him why the same should not be done, and as a consequence of this notification, Mr. Alvarado appeared before this court and stated under oath that he had nothing to object against the cancellation of the registration of his ownership and that he could not pay the purchase price.

As 4th offense we allege: Res Adjudicata.

That Don Alejandro Alvarado, as owner of the plantation "Semil", by purchase from Don Marcelino Torres Zayas, brought a suit in this court against Mr. William Sturgis Hooper Lothrop while the foreclosure proceedings to collect the mortgage constituted

upon the property "Semil" was pending, whereby he brought the same actions brought in the complaint now answered by us, and that the said suit ended by a final judgment against the said Mr. Alvarado.

As fifth defense we allege: Statute of Limitations.

The actions for annulment are barred.

I. Because they can be brought only during the course of the foreclosure proceedings to collect the mortgage, and not after the same has ended.

II. In accordance with section 37 of the Mortgage Law and section 140 of the Code of Civil Procedure.

The actions for damages are barred:

In accordance with section 1869 of the Civil Code.

47 As 6th defense we allege:

That the mortgage constituted upon the property "Semil" for the sum of $37000, has not been paid, nor the interest thereon, either by Don Marcelino Torres Zayas, or his assignee Don Alejandro Alvarado; and that the same has been paid by Don Pedro Juan Rosaly to the holders and legitimate owners of the notes by which the said mortgage was represented; that is, Messrs. Lothrop Luce & Co., and has been cancelled by the latter; and that if the judicial sale and the registration thereof in the registry should simply be declared null and void without making any declaration with regard to the force and subsistence of the mortgage and to the obligation of the plaintiff to pay the same, the latter would be relieved from the payment of said mortgage without having paid the same.

By virtue of the foregoing, we pray the Hon. Court, to dismiss the complaint with regard to the first cause of action brought therein; and that in case the complaint should succeed, the court should hold that the mortgage for the amount of 37000 dollars and interest thereon at the rate of 10% is still in force upon the property "Semil".

As 7th defense, in so far as the first cause of action is concerned, and only in so far as such action may affect the right of Messrs. Lothrop Luce & Co. we allege:

That the mortgage constituted by Pedro J. Rosaly in favor of Lothrop Luce & Co., for the sum of 30000 dollars, on the 7th of October 1905, was to secure the payment of notes payable to order, and issued for the aforesaid amount, which notes are now in the hands of third persons, by virtue of the indorsements legally made thereon and for valuable consideration, which persons are the legitimate owners of the mortgage the annulment of which is sought.

48 With regard to the second cause of action, the defendant Pedro J. Rosaly alleges:

As First Defense: That the same does not state sufficient facts to constitute the causes of action brought therein against the said defendants.

As Second Defense: We deny all the facts thereof except in so far as the same have been admitted in the specific denial made in the foregoing cause of action.

As Third Defense: The statute of limitations, in accordance with section 1869 of the Civil Code.

Ponce, P. R., February 19th, 1908.

JOSÉ TOUS SOTO,
Counsel for the Defendants Now Appearing.

Service accepted on this 20th day of February, 1908.

BOERMAN AND LLORENS,
Counsel for Plaintiff.

Filed February 20th, 1908.

F. BARNÉS, *Secretary.*
By F. W. PRESTON,
Deputy Secretary.

49 *Opposition.*

In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Annulment of Foreclosure, etc.

Opposition.

Now comes the plaintiff and opposes the Fifth Defense contained in the answer, in so far as the two subdivisions thereof regarding the action for annulment and the other subdivision thereof regarding the action for damages, are concerned, and alleges that none of the above actions is barred by the Statute of Limitations.

The plaintiff opposes also the Third Defense to the second cause of action, which is the Statute of Limitations.

BOERMAN & LLORENS,
Counsel for Plaintiff.

Service accepted on this 24th February, 1908.

JOSÉ TOUS SOTO,
By M. TOUS SOTO,
Counsel for the Defendants Who Have Appeared.

Filed February 24th, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary

50 *Demurrer to the Answer.*

In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Annulment of Foreclosure, etc.

Demurrer to the Answer.

Now comes the plaintiff and demurs to that part of the answer filed by the defendants Lothrop Luce & Co. and Pedro Juan Rosaly, entitled Third Defense, as well as that part entitled Fourth Defense, and as ground of his demurrer alleges: That these parts or paragraphs of the answer do not state sufficient facts to constitute a defense to the complaint.

BOERMAN & LLORENS,
Counsel for Plaintiff.

Service accepted on this 24th day of February, 1908.

JOSÉ TOUS SOTO,
By M. TOUS SOTO,
Counsel for the Defendants Who Have Appeared.

Filed February 24th, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary

51 *Decision of the Demurrer to the Answer.*

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Annulment of Foreclosure, etc.

Decision of the Demurrer to the Answer.

A demurrer has been filed to the first and fourth defenses of the answer, on the ground that such defenses do not state sufficient facts to constitute a defense to the complaint. The third defense alleges that plaintiff herein has nothing to do with this cause of action, if any there be; and that he is not at all interested in the ownership of the property "Semil".

The above defense seems to be sufficient.

The fourth defense alleges that Don Alejandro Alvarado, who purchased the property "Semil", before the institution of the fore-

closure proceeding, brought a suit against the assignor of the defendants herein, whereby he brought the same actions brought in the complaint filed in the case at bar; and that the said suit ended by a final judgment rendered against Mr. Alvarado. It appears that there are in his defense, identity of parties, identity of the character of the parties and identity of the subject matter. It does not appear whether there is identity of causes of actions, because this court is still in doubt with regard to the kind of action brought in the complaint filed herein. The demurrer is dismissed with costs to the plaintiff.

Ponce, P. R., April 6th, 1908.

MARTIN E. GILL,
District Judge.

52 *Default of the Defendant Alice Lothrop.*

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Annulment of Foreclosure, etc.

Motion.

Before the Hon. the Judge of the Court.

Now comes the plaintiff in the above entitled case, by his undersigned counsel, and shows:

That as shown by the affidavit filed herewith, the defendant Doña Alice Lothrop is absent from this island, her residence at the present time being unknown.

It does not appear from the said affidavit, that Da. Alice Lothrop is the universal heiress of Mr. William Sturgis Hooper Lothrop; that the latter died in this city; and that the said defendant is a necessary and proper party to this suit, and that there is against her a good cause of action as the same has been brought.

Whereupon, we pray the court to make an order directing that the citation of the said defendant be made by publication of the summons, in the newspaper the "Porto Rico Eagle" which is published in this city, and directing further that the notices be published once every week during the course of one month, under the provisions of sections 94 and 95 of the Code of Civil Procedure now in force; and to direct also, that a copy of the summons be sent by mail to the aforesaid defendants.

Respectfully,

BOERMAN & LLORENS,
Counsel for Plaintiff.

Filed December 20th, 1907.

F. BARNÉS, *Secretary.*

53 MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO. et al.

Annulment of Foreclosure, etc.

Affidavit.

I, Marcelino Torres Zayas, being sworn, say that I am the plaintiff in the above entitled case; that on the said 26th day of February, 1901, the affiant, being then married and owner of the property "Semil" of 535 cuerdas, constituted thereon a mortgage in favor of Mr. William Sturgis Hooper Lothrop, for the sum of 370000 thousand dollars.

That on the 3rd day of May 1904, the said mortgage had not become due and the affiant owed nothing to his creditor Lothrop as interest thereon. That on the aforesaid day the said Mr. Lothrop filed a complaint against the affiant, instituting thereby a foreclosure proceeding to collect four thousand six hundred dollars as interest due. That it was maliciously stated in the aforesaid complaint that the affiant was owing such interest, which was not true. That the mortgage constituted on the aforesaid property and some others, was so constituted to secure the payment of eight notes issued for the amount of five thousand seven hundred and fifty dollars each; and that according to my information and belief Mr. Lothrop transmitted the said notes to third persons, before the 26th day of February 1904, and that the said notes were also in the hands of third persons on the 3rd day of May, 1904. That the said notes were not filed in the court with the said complaint, nor were they produced during the course of the whole foreclosure proceedings.

That on the 3rd day of May, 1904, the District Court of
54 Ponce, by virtue of the foreclosure proceeding brought by Mr. Lothrop, issued a writ against Mr. Torres Zayas, who was the only defendant in said proceeding, the mandatory precept of which literally reads:

"It is directed that Don Marcelino Torres Zayas, a resident of Juana Díaz, or any other person who may be legally in charge of the property mortgaged, be required to make payment to the creditor, the plaintiff Mr. William Sturgis Hooper Lothrop, or to his legal representatives in this city, within thirty days, of the sum of four thousand six hundred dollars, which he is owing the latter as interest due up to the 21st of February last, and of those which, at the legal rate, may become due on said amount up to the moment of making the payment, and to pay the costs, and to warn him that in case he fails to do so the property mortgaged will be sold at auction to secure the payment of said liabilities. And for the proper return of this writ, an order shall be issued to the Municipal Court of Juana Díaz, in accordance with the further prayer of the petition. The presiding judge of this Court Don Isidoro Soto Xussa is appointed Examining Judge for this cause. It was agreed upon and

signed by the judges of this Court; and attested by me.—Isidoro Soto Nussa.—R. Sanchez Montalvo.—H. S. Belaval. Luis Gautier."

It was stated by the said court of Ponce, in said writ, that the same was issued upon consideration of the facts stated in the complaint filed by Mr. Lothrop, wherein the latter stated that he bound himself to pay whatever damages might accrue to the debtor, Torres Zayas, caused by any malice or negligence incurred in the faithful
55 statement of the facts contained in his complaint (Mr. Lothrop's); but he did not bind himself in the same manner with regard to the other circumstances which the court should have taken into consideration so as to authorize the proceeding and entertain the same. The aforesaid writ of the court of Ponce, of the third of May 1904, at which date the said court was composed of three judges, was subscribed only by two of the judges of the court. In pursuance of the aforesaid writ (of the third of May 1904), the marshal of the court of Ponce required Don Marcelino Torres Zayas to make payment in the form directed in said writ; but the co-owner of the land, Da. Mercedes Laborde, was not so required nor was she ever notified with regard to said proceeding. A copy of said complaint was not delivered, either, to Don Marcelino Torres, nor to any other person on his behalf; nor was the said Torres, or his wife, required to pay any amount whatsoever after the auction sale had taken place, nor was any order or summons of the court served on them during the whole course of said proceeding, with the single exception of the writ issued when the proceeding was initiated, which was served on Mr. Torres, as stated in the foregoing allegations.

After the thirty days given to Mr. Torres Zayas, to make the payment, had elapsed, the court of Ponce on motion of Mr. Lothrop's counsel, made an order directing the property mortgaged to be sold at public auction for failure of Mr. Torres Zayas to make the payment of the sum claimed by his creditor (then plaintiff Mr. Lothrop), within the thirty days given him for such purpose. But this order of the court of Ponce, which appears to have been made on the 16th of June of the said year, 1904, was authorized and subscribed only by two of the judges of said court, which, at
56 that time, was composed of three judges.

That on the 19th of July, 1904, the District Court of Ponce made an order directing that execution should be issued in pursuance of the writ of the third of May, 1904. And although this writ did not provide for the attachment of the property, nor the sale thereof at public auction (as it only required the debtor to make payment), nevertheless the marshal of the said court of Ponce, without proper order therefor, attached the properties mortgaged, of Mr. Torres Zayas, on the 30th of July, 1904, without appearing on the place where they are situated, and then proceeded to sell them at public auction.

In pursuance of the said auction, notice were published in the local paper "The Porto Rico Eagle." A notice was published for the first time on the 24th of August, 1904; the second time, on the 31st of the same month and year; the third time, on the seventh

day of September, of said year; and the fourth, and last time, on the fourteenth of September, of said year 1904. The auction sale took place on the 12th of September, 1904, that is to say, two days prior to the publication of the last notice. Therefore the notices were published only during the term of twenty days, and the sale took place eighteen days after the publication of the first notice.

The valuation given to the property in said mortgage was not stated in said notices, so that said valuation should be taken as basis for the sale. Nor was said valuation taken into consideration for the purpose of the same, nor were the bidders required to pay 10% of said valuation so that the property was sold at first auction without subjection to any rate of valuation.

That on the same day, the twelfth of September, 1904,
57 the Secretary of the court, after the auction sale had taken place, accepted the offer of the defendant herein Don Pedro Juan Rosaly, for the amount of Five Hundred Dollars, plus the costs of the proceeding and his obligation to pay the mortgage then constituted upon the property, and said secretary issued a certificate in his favor as title for the Registry of Property; that the return of the marshal shows that the sale was made without subjection to any rate of valuation and that it was made on the 18th day after the publication of the first notice, all of which is contrary to law.

That afterwards, and without any order of the court of Ponce, the marshal thereof, on the 7th of October, 1905, executed a deed of the property mortgaged and sold, in favor of the defendant Don Pedro Juan Rosaly y Capó, before Don J. Fernandez Coronas, a notary public of Ponce; and on the same day and before the same notary, the defendant Mr. Rosaly Capó constituted a mortgage upon the said property for the sum of Thirty Thousand Dollars in favor of the mercantile partnership of this city "Lothrop Luce and Co.," who are also defendants in this suit. And the aforesaid deeds have been recorded in the Registry of Property of Ponce.

That the plaintiff Marcelino Torres was on the 26th of February, 1901, and still is, the owner of the property "Semil," which belongs to him as matter of right, although the same appears to be recorded in favor of Don Pedro Juan Rosaly, and is in the possession of the defendants.

That Mr. William Sturgis Hooper Lothrop died in the year 1906, his sole heiress being his widow, the defendant Alice Lothrop.

That Mr. Lothrop appropriated to himself the crop of one
58 thousand quintals of coffee, produced by the property "Semil," during the months of November and December 1904, and January and February, 1905, the net and liquidated proceeds of which crop, according to my information and belief amounted to eight thousand dollars. That according to my information and belief Don Pedro Juan Rosaly, as agent of Mr. Lothrop, appropriated to himself and sold the crop of coffee produced during the months of November and December, 1905, and January and February, 1906, the net proceeds of which, according to my information and belief, amounted to ten thousand dollars. And he also apropriated to himself the sum of twelve thousand dollars, which was the net amount

of the proceeds during November and December, 1906, and January and February, 1907, according to my information and belief.

That according to my information and belief, the defendant Mr. Rosaly as well as all the members of the mercantile partnership Lothrop Luce & Co. had personal knowledge of the defects and of nullity the foreclosure proceeding referred to; that according to my information and belief, although Mr. Rosaly appeared as purchaser of the property "Semil", and had recorded the same in his own name, actually he is nothing more than a trustee for the plaintiff Mr. William Sturgis Lothrop, and the property actually belongs now to the heiress or widow of William Sturgis Lothrop and not to Mr. Rosaly, and that according to my information and belief, Lothrop Luce & Co., who appeared as mortgage creditors with regard to this property are nothing else than trustees who hold the aforesaid mortgage in trust for the heiress of William Sturgis Lothrop.

That the defendant Da. Alice Lothrop is absent from Porto Rico, and according to my information and belief her residence is at Beacon street, in the city of Boston, State of Massachusetts.

59 That plaintiff has taken steps to ascertain her whereabouts and has received the information stated which he believes to be true. That the marshal of this court returned the summons issued for the citation of the said defendant stating that she could not be summoned on account of being absent. That the plaintiff has taken all possible steps with proper diligence and ascertained that the defendant Da. Alice Lothrop is not found in the island of Porto Rico.

That on account of the foregoing facts, affiant and his wife have had mental suffering and have been materially damaged having been deprived of their property and bound to live with very scarce means, their credit being lost, and they being compelled to apply themselves to hard work to support their families, which damages they estimate in the sum of twenty thousand dollars. And that, therefore, we have a good cause of action in this suit against the defendant Alice Lothrop and further defendants, and that the said Alice Lothrop is a necessary or proper party thereto.

And that all the foregoing facts are true and constitute matters of my own personal knowledge, except those stated according to information and belief, which I believe to be true.

Wherefore the court is hereby prayed to issue an order directing that the citation of Da. Alice Lothrop be made by publication of the summons, designating the paper wherein the same shall be published, for the period of one month, once a week, and directing further that a copy of said summons and of the complaint be sent by mail to the aforesaid lady, addressed to the place of her residence, at Beacon st., Boston, Massachusetts.

MARCELINO TORRES.

60 Sworn to and subscribed before me, by Marcelino Torres Zayaz, personally known to me, on this 19th day of December, 1907.

CARLOS F. CHARDON,
Notary Public.

Filed on 20th December, 1907.

F. BARNÉS,
Secretary.

61 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co., et al.

Annulment of Foreclosure, etc.

Order.

And affidavit having been filed by the plaintiff herein, Marcelino Torres Zayas, from which it appears that Da. Alice Lothrop one of the defendants, is not found within the island of Porto Rico, and that her residence is in the State of Massachsuetts; that there is a good cause of action against the said defendant and that she is a necessary party to this suit; that the marshal of this court returned the summons issued for the citation of the said defendant, the heiress of William Sturgis Hooper Lothrop, the said marshal being unable to make proper service of said summons because the said defendant was absent; and that her residence is at Beacon Street, in the city of Boston, State of Massachusetts, it is hereby ordered by this Court, that the citation of the said defendant Doña Alice Lothrop, be made by publication of the summons in the newspaper called "The Porto Rico Eagle", published in the city of Ponce, the said publication to be made once a week and for the period of one month; and it is further ordered that a copy of said summons as well as of the complaint be sent by mail to said lady addressed to the place of her residence, at Beacon Street, Boston Mass.

Ponce, P. R. January 9th, 1908.

MARTIN E. GILL, *Judge.*

62 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co.

Annulment of Foreclosure, etc.

Affidavit of Publication.

The undersigned, being under oath, solemnly deposes and says: that he is the Editor of the paper the Porto Rico Eagle, which is published daily at the city of Ponce and which has a general circulation throughout the island of Porto Rico. That the summons at-

tached to this affidavit have been published in full in said paper, on the following dates: the 13th, the 20th and 27th days of January, on the 3rd, the 10th and 17th and 19th days of February, of the year 1908.

R. SANTONI.

Sworn to before me on this 28th day of February, 1908.

M. ALBERTO SALICRUP,
Notary Public.

There is a seal fixed thereon which reads: M. Alberto Salicrup, Notary Public, Ponce, P. R.

Filed on this 3rd March, 1908.

F. BARNÉS, *Secretary.*

63 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
ALICE LOTHROP et al.

Affidavit.

I, Alejandro Cabassa, being sworn, say: that on the 18th of February, 1908, I sent by registered mail a copy of the summons and of the complaint hereto attached, under an envelop addressed to Da. Alice Lothrop, Beacon Street, Boston, Mass.

ALJ. CABASSA.

Sworn to before me on this 28th day of February, 1908.

TOMÁS CASTILLO,
Notary Public.

There is a seal fixed thereon which reads: Tomás Castillo León. Attorney-at-law.—Notary.—Ponce, P. R.

Filed on this 3rd March, 1908.

F. BARNÉS, *Secretary.*

The complaint referred to in the foregoing affidavit is that which has been transcribed herein at the commencement of this transcript of record; and the summons referred to in the aforesaid affidavit and in the affidavit of publication formerly transcribed, literally copied reads as follows:

Notice.

UNITED STATES OF AMERICA,
The President of the United States, ss:

In the District Court for the Judicial District of Ponce, P. R.

64 MARCELINO TORRES ZAYAS and MERCEDES LABORDE Y PEREZ,
Plaintiff-,
vs.
ALICE LOTHROP, LOTHROP, LUCE & CO., PEDRO JUAN ROSALY Y CAPÓ, and ENRIQUETA CABRERA Y PAZ, Defendants.

Summons.

The People of Porto Rico to Da. Alice Lothrop, One of the Defendant- Abovementioned:

You are hereby notified: that in the office of the Secretary of the District Court for the Judicial District of Ponce, P. R., a complaint has been filed by the plaintiff abovementioned, by their counsel Boerman and Llorens, wherein they pray this Court to render judgment in this suit declaring the law and the facts to be in favor of the plaintiffs and against you and the other defendants therein, and also holding as follows:

1st. Holding that Don Marcelino Torres Zayas was not bound to pay on the 3rd of May, 1904, four thousand six hundred dollars as interest due on the 26th of February of the said year 1904, by reason of the mortgage constituted on the 26th of February, 1901, before the notary public of the city of Ponce, Don Rosendo Matienzo Cintrón, by the aforesaid Mr. Torres Zayas in favor of your husband Mr. William Sturgis Hooper Lothrop, for the sum of forty six thousand dollars, which mortgage credit has been recorded in the registry of Property of Ponce, on folio 245 of Book 30th of Juana Díaz, property No. 1538, registration 8th; and that notwithstanding the said Mr. Torres Zayas on the third day of May 1904, had paid to his creditor Mr. William Sturgis Hooper Lothrop, the aforesaid four thousand six hundred dollars; and that therefore; the said Mr. Lothrop
65 lacked any right whatsoever to institute on the third day of May, 1904, the foreclosure proceeding which he instituted on said date and carried on, as referred to in the complaint; and that there was malice and negligence in the statement of facts made in the aforesaid complaint instituting the foreclosure proceedings, and filed in this court by Mr. Lothrop against Mr. Torres Zayas on the said day, the 3rd of May, 1904.

II. Holding that all orders made by the court, all writs issued by the secretary, and all services and returns made by the marshel and sheriff of the District Court for the Judicial District of Ponce, during the course of the foreclosure proceeding brought by Mr. William Sturgis Hooper Lothrop against Don Marcelino Torres Zayas, which was instituted with the filing of the complaint on the third of May,

1904, which proceedings and complaint have been referred to in the allegations made in the said complaint, are null and void and without any effect whatsoever.

III. Holding that the whole of the said foreclosure proce-ding is null and void from the beginning up to the termination thereof.

IV. Holding that the certificate issued by the marshal of the court of Ponce in favor of Don Pedro Juan Rosaly, on the 12th day of September, 1904, when the option sale of the property "Semil" took place, whereby the said property was adjudicated to him by the acceptance of the offer made by him in said sale, is null and void, and holding, further, that such sale is null and void.

V. Holding that the deed of judicial sale executed by the marshal of the Court of Ponce in favor of Don Pedro Juan Rosaly, on the 7th of October, 1905, before J. Fernandez Corona, a notary public of Ponce, and the registration of said deed in the Registry of
66 Property of Ponce, are null and void.

VI. Holding that the mortgage constituted by Don Pedro Juan Rosaly, on the 7th of October, 1905, upon the same property "Semil," in favor of Lothrop Luce & Co., before Fernandez Corona, a Notary Public, and the registration thereof in the Registry of Property of Ponce, are null and void.

VII. Holding that the said property "Semil" belongs to the plaintiffs in this suit Marcelino Torres Zaya, and Mercedes Laborde y Perez who are the legitimate owners thereof; and directing them to be put in possession of the said property, which description is as follows: "A coffee plantation named "El Semil," situated in the ward of Villalba-arriba, in the municipal jurisdiction of Juan Díaz, covering an area of five hundred and thirty five cuerdas and sixteen hundredth equivalent to two hundred and ten hectares, fifty three ares and ninety two centiares, with the following establishments: a wooden dwelling house, with zinc; another of the same construction for a store; a wooden ware-house covered with zinc for the storage of fruits with special arrangements for the drying thereof on the ground floor; a hulling machine for coffee; a shed for laborers and twelve small wooden houses covered with zinc, for the dwelling of the laborers' families. The said property is bounded on the North by a public road and by lands belonging to Juan Felix Baez, Socorro García, and to the Succession of Don Severo Segarra; on the East, by lands belonging to Don Domingo Olivieri, to the succession of Catalina Matos, to Lucas Negrón, Julian Negrón, to Don Domingo Olivieri, to the succession of Juan Angel Rosario, to Tomás Negrón and to José Torres; on the South, by lands belonging to Don José Genaro Rivera, Don José del Carmen, Da. Dominga Negrón, Don Marcial Serrallés, Eduvigis Rodriguez, Ramón Sanchez, Pedro Morales, and Don Antonio Santí; and on the West, by a public
67 road and lands belonging to Don Juan Zaragoza, Don José del Carmen Negrón and the succession of Don Severo Segarra.

VIII. That in case the court should not consider it to be just to decree that the said property "Semil" be returned to the plaintiffs, the court is prayed to adjudge and decree that the defendants, or such

defendants as the court should deem liable on account of the facts stated in the complaint pay to the plaintiffs the proper value of the aforesaid property, which is not less than eighty thousand dollars.

IX. To adjudge that Da. Alice Lothrop as heiress of W. S. H. Lothrop pay over to the plaintiffs eight thousand dollars, amount of the proceeds of the coffee crops of the aforesaid property, during the months of November and December, 1904, and January and February, 1905, and the twenty two thousand dollars, amount of the proceeds of said property during the months of November and December, 1905, January and February, 1906, November and December, 1906, and January and February, 1907.

X. That in case the court should consider it more proper, in furtherance of justice, to adjudge that Don Pedro Juan Rosaly y Capó, instead of Da. Alice Lothrop, pay over to the plaintiff the twenty two thousand dollars amount of the produce of the property "Semil," during the months of November and December, 1905, January and February, 1906, November and December, 1906, and January and February, 1907.

XI. To adjudge that Da. Alice Lothrop as sole heiress of W. S. H. Lothrop, indemnify the plaintiff — the sum of twenty thousand dollars, as damages for the moral sufferings and material loss sustained by them on account of the facts stated in the complaint.

XII. And adjudging Da. Enriqueta Cabrera y Paz to consent to the declaration of nullity of the foreclosure proceeding and of the deeds and registration thereof, referred to in the complaint,
68 and to give also her consent to the sale of the real properties acquired by her husband during the existence of the conjugal partnership, in so far as the same might be necessary to be sold to cover the amounts claimed from her said husband by virtue of this suit; and to impose the costs upon the defendants in this suit.

And you are hereby notified, that in case you fail to appear and answer this complaint within forty days after service, to be counted from the last publication of the summons, the plaintiff- may obtain that your default, as defendant, be entered, and through due process of law and proper proofs of the allegations contained in their complaint, they may further obtain judgment against you, as prayed for.

Given under my hand, and under the seal of this court, at Ponce, P. R. this tenth day of August, 1907.

(Signed) FRANCISCO BARNÉS,
Secretary of the Said Court.

There is affixed hereon the seal of said court of Ponce.

The foregoing is a true and faithful copy of the summons issued for your citation as defendant. And it is further stated that the plaintiffs by a motion filed together with an affidavit obtain an order from the court directing your citation by publication of the summons.

And for the publication thereof, once a week, during thirty days, in the paper "The Porto Rico Eagle" of Ponce, P. R., and in

pursuance of the aforesaid order of this District Court of Ponce, the present notice is hereby issued under my hand and the seal of this District Court of Ponce, at Ponce, P. R. January 9th, 1908.

F. BARNÉS,
Secretary of the District Court for the Judicial District of Ponce, P. R.

Filed on this 3rd March, 1908.

F. BARNÉS *Secretary.*

69 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES
vs.
LOTHROP, LUCE & Co. et al.

Petition for Default.

The Secretary of the Court:

The term allowed the defendant Da. Alice Lothrop, in the summons, to file her answer to the complaint having elapsed, the plaintiff requests you to enter her default with regard to said complaint.

Respectfully,

BOERMAN & LLORENS,
Counsel for Plaintiff.

Filed April 3rd, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary.

70 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co. et al.

Annulment of Foreclosure, etc.

Motion for Judgment.

Before the Hon. the Judge of the Court.

Now comes the plaintiff and says:

That the defendant in this suit Da. Alice Lothrop was summoned by publication; that the time to file her answer has expired; that the evidence showing the publication of the notices appears in the record, from which it also appears that no answer or demurrer has been filed to the complaint. Wherefore, plaintiff Prays the Court,

to render judgment against Da. Alice Lothrop, in the manner provided for in paragraph 3 of section 194 of the Code of Civil Procedure now in force.

Respectfully,

BOERMAN AND LLORENS,
Counsel for Plaintiff.

Filed April 3rd, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary.

Entry of Default.

The defendant in this suit Alice Lothrop, having been duly summoned, and having failed to appear and answer the complaint, and the term of forty days given by law to said defendant to answer the complaint having expired, her default is hereby entered,
71 as prayed for on this day by the plaintiff through his counsel Don Luis Llorens Torres.

In witness whereof I hereunto affix my name and the seal of the court, at Ponce, P. R. April 3rd, 1908.

FRANCO. BARNÉS, *Secretary,*
By P. J. MASSANET,
Deputy Secretary.

72 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
ALICE LOTHROP et al.

Motion.

Now comes the plaintiff, by Boerman and Llorens his counsel, and moves this Hon. Court to direct the filing of the supplemental complaint with regard to facts occurred after the filing of the complaint in this suit.

BOERMAN & LLORENS,
Counsel for Plaintiff.

Service accepted on this 3rd. day of February, 1908.

JOSÉ TOUS SOTO,
Counsel for Defendants.

Filed this 3rd. March, 1908.

F. BARNÉS, *Secretary.*

73 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
ALICE LOTHROP et al.

Supplemental Complaint.

The plaintiff by this supplemental complaint alleges:

That after the filing of the complaint, the defendant Mr. Rosaly as attorney-in-fact of Mr. W. S. Lothrop and of his successor Da. Alice Lothrop, appropriated to himself the coffee-crop of the estate "Semil" described in the complaint, which crop amounted to nearly three thousand quintals of coffee, during the months of November and December 1907, and January and February 1908, the net and liquidated proceeds of which, after deducting the expenses, amounted to twenty thousand dollars.

Wherefore the plaintiff prays this Hon. Court to direct Da. Alice Lothrop, or Mr. Rosaly, if the court should consider it more proper in furtherance of justice to return also to the plaintiff the twenty thousand dollars which constitutes the net proceeds of the last crop.

BOERMAN AND LLORENS,
Counsel for Plaintiff.

Service accepted this 3rd. March 1908.
JOSÉ TOUS SOTO,
Counsel for the Defendants Who Have Appeared.

Filed on this 3rd March, 1908.
F. BARNÉS, *Secretary.*

74 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
ALICE LOTHROP et al.

Motion.

Now comes the plaintiff, by his counsel Boerman & Llorens, and moves this Hon. Court to make an order allowing the filing of the complaint presented with this motion.

BOERMAN & LLORENS,
Counsel for Plaintiff.

Service accepted on this 3rd. March, 1908.
JOSÉ TOUS SOTO,
Counsel for Defendants.

Filed on this 3rd. March, 1908.
F. BARNÉS, *Secretary.*

75 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
ALICE LOTHROP et al.

Amendment to the Complaint.

The plaintiff hereby amends his amended complaint as follows:
First. In the title thereof the following are to be added as defendants: Robert Roe, John Doe, Samuel Flin, James Gray, Charles Hamilton, John Smith and James Jones, which are all fictitious names substituted for the actual names which are unknown to the plaintiff.
Second. By adding to paragraph eighth of the fourth cause of action stated in the complaint, the following allegations:
"That the mortgage constituted by the defendant Mr. Rosaly y Capó in favor of Lothrop Luce & Co. was to secure the payment of certain notes alleged to have been issued which were fraudulently issued and without consideration, and that the said notes are now in the hands of different persons, the actual names of whom are not known to the plaintiff, for which reason the latter designates the same with the following fictitious names: Robert Roe, John Doe, Samuel Flin, James Gray, Charles Hamilton, John Smith, and Samuel Jones".
Third. By adding to paragraph sixth in the prayer of the first cause of action of the amended complaint, the following words: "and holding that the notes issued with the constitution of the mortgage in favor of Lothrop Luce & Co. are null and void."

BOERMAN & LLORENS,
Counsel for Plaintiff.

Service accepted on this 3rd. of March, 1908.

JOSÉ TOUS SOTO,
Counsel for the Defendants.

Filed on this 3rd. March, 1908.

F. BARNÉS, *Secretary.*

76 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co.

Motion to Amend the Complaint.

The answer filed in this suit alleges, as seventh defense, "that the mortgage constituted by Pedro J. Rosaly in favor of Lothrop Luce

& Co. for the sum of thirty thousand dollars, on the 7th of October, 1905, was to secure the payment of such certain notes payable to order, issued for the aforesaid amount, which are now in the possession of third persons, etc."

After the filing of the answer, a motion was made to amend the complaint, in such a manner as to allege: "that the mortgage constituted by Mr. Rosaly—defendant—in favor of Lothrop Luce & Co., was to secure the payment of certain notes alleged to have been issued, which have been fraudulently issued and without consideration."

The allegation of any complaint should be based on the knowledge of the plaintiff or on his information and belief (Sect. 118 of the Code of Civil Procedure). It is very doubtful that the plaintiff herein may have knowledge or information or belief of the truth of the allegation sought to be made.

Motion dismissed, with costs to the plaintiff.

Ponce, P. R., March 28th, 1908.

MARTIN E. GILL,
District Judge.

77 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
ALICE LOTHROP et al.

Answer to the Supplemental Complaint.

Now comes before the Hon. Court, Pedro J. Rosaly, defendant, by José Tous Soto, his counsel, and alleges:

That he denies the facts contained in said complaint.

Ponce, P. R., March 17th, 1908.

JOSÉ TOUS SOTO,
Counsel for Pedro J. Rosaly.

Service accepted on this 17th of March, 1908.

BOERMAN & LLORENS,
Counsel for Plaintiff.

Filed on this 17th of March, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary.

78 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co.

Motion to Amend the Complaint.

Before the Hon. the Judge of the Court.

Now comes the plaintiff and takes an exception from the order made by this Hon. Court on the 28th of March of the present year deciding the motion above stated, and prays the Court to consider the aforesaid order as having been excepted to for whatever effects may be proper.

Respectfully,

BOERMAN & LLORENS,
Counsel for Plaintiff.

Filed on this 3rd April, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary.

79 *Judgment.*

Case No. 140.

MARCELINO TORRES et al. (Counsel Llorens),
vs.
LOTHROP, LUCE & Co. et al (Counsel Tous Soto).

Annulment of Foreclosure and Other Petition.

At the city of Ponce, P. R. this 21st day of April, 1908; this case coming on to be heard on the 18th and 20th day of the present month, having been previously set for trial in the calendar, the plaintiffs Don Marcelino Torres Zayas and Da. Mercedes Laborde y Perez having appeared by their counsel Don Luis Llorens Torres, and the defendants Lothrop Luce & Co. Don Pedro Juan Rosaly, Da. Enriqueta Cabrera y Paz and the succession of William Sturgis Hooper Lothrop by their counsel Don José Tous Soto:—the opinion of the court is, after having heard the complaint and the answer thereto as well as the evidence introduced by both parties, that the law and the facts are in favor of the plaintiffs and against the defendants; that the filing of this complaint constitutes an attack upon the integrity and good standing of the defendants and of Mr. Lothrop, deceased; that such attack has fully failed; and that the complaint lacks absolutely any ground whatsoever under any regard or principle of law under which the same might be considered; and Therefore, the court should dismiss and does dismiss the complaint

with costs to the plaintiff. Judgment rendered at the city of Ponce, P. R. this twenty first day of April, 1908, and entered on the same day, month and year.—Attest.—F. Barnés, Sect. Dist. Court.—Approved—Martin E. Gill, Dist. Court, Judge."

80 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO JUAN ROSALY Y CAPÓ Y ALICE LOTHROP.

Action Involving: 1st, the Nullity of a Foreclosure Proceeding and Judicial Sale, as Well as That of a Mortgage and of Certain Registrations Made in the Registry of Property; 2nd, Claim of Certain Rents & Proceeds of Fruits, and 3rd Damages.

Notice of Appeal.

The Secretary of the Court:

You are hereby notified that an appeal is hereby taken by us to the Supreme Court of Porto Rico from the judgment rendered in this suit and entered on the 21st day of the present month of April, 1908.

Respectfully,

BOERMAN & LLORENS,
Counsel for Plaintiffs.

Service accepted on this 22nd day of April, 1908.

JOSÉ TOUS SOTO,
Counsel for Defendants.

Filed on this 22nd day of April, 1908.

F. BARNÉS, *Secretary,*
By F. W. PRESTON,
Deputy Secretary.

81 In the District Court for the Judicial District of Ponce, P. R.

MARCELINO TORRES ZAYAS
vs.
LUCE, CREHORE & Co. et al.

Bill of Exceptions.

Be it remembered, that at the trial of the above entitled case, held in the April term of this Court of the year 1908, the following exceptions were taken and entered on record on the part of the plaintiff, to wit:

No. 1. While the witness Pedro Juan Rosaly, an agent of the defendant, was being examined, by counsel for plaintiff, the latter offers evidence with regard to the delivery of certain coffee during the years 1901, 1902, 1903, which evidence, without objection from counsel for the defendants, is excluded by the court, and the plaintiff took an exception from this ruling of the court.

No. 2. The court excluded all evidence tending to establish the value of the crops produced by the property "Semil" during the years from 1903, up to the present date, and the plaintiff took an exception from this ruling of the court.

No. 3. The following appears from the testimony of Mr. Rosaly, while he was answering to questions put to him by counsel for the defendants:

C.: How does the endorsement made on said notes in favor of Buchanan read?

W.: For value received we hereby jointly and severally guarantee, in favor of J. A. Buchanan, the payment of the amount of this note, at the maturity thereof less our annual commission of
82 two per cent on the interest of said note, waiving all notifications and protests.

C.: Then, did Deford & Co. reserve the right to charge to Buchanan a commission on the amount of the interest of said notes?

W.: Yes sir.

C.: Had De Ford & Co. the right, in accordance with the aforesaid endorsement, to collect the interest on said note?

W.: Of course.

C.: Is the witness a merchant and has been so for a long time?

W.: Yes Sir.

C.: What is the meaning of an indorsement made in this form, under the practice in commerce?

The plaintiff objects to the foregoing question, which was admitted by the court, and from this ruling of the court the plaintiff took an exception.

W.: It means that De Ford & Co. remain as trustees of the thing in full, not only for the collection thereof but for any other steps that might be necessary to take even in the courts.

The plaintiff objects to the admission of the question, the court allows the same, and the plaintiff takes an exception from this ruling of the court.

C.: What is the meaning of a signature in blank like that affixed by Mr. Buchanan on this note?

The plaintiff objects to the foregoing question, and as the same was allowed by the court, the plaintiff took an exception.

W.: That the same has been returned by him, that the
83 same has been placed by him on the same condition that it had when De Ford & Co. held the same prior thereto.

C.: Did you answer to questions put to you by the adverse party that the stipulation in the mortgage deed with regard to the delivery

of coffee by Mr. Torres in payment of the interest was modified by a subsequent agreement?

The plaintiff objects to the foregoing question, and allowed by the court, the plaintiff took an exception.

W.: Yes Sir.

C.: How was that modification made?

Objection by the plaintiff and exception taken by him.

W.: It was favorable to Mr. Torres and I made the same in behalf of the firm.

C.: Are you an agent for the firm?

Objection and exception taken by the plaintiff.

W.: Yes Sir.

C.: Were they the same contracting parties who executed the deed?

Objection and exception taken by the plaintiff.

W.: Yes Sir.

C.: Was the modification made only with regard to the application that should be given to the coffee delivered?

Objection and exception taken by the plaintiff.

W.: Yes Sir.

C.: State the stipulations submitted by you to Mr. Torres.

Objection and exception taken by the plaintiff.

W.: According to the stipulations contained in the deed, Mr. Torres Zayes had no right to have funds advanced to him for
84 the expenses of the crop; about the middle of the year 1902, he told us that he had the property mortgaged; it was impossible to raise money to advance to him to cover said expenses and it was stipulated that money could be obtained by issuing notes signed by him, said money to be applied by him to the payment of said expenses and the money so advanced should be paid out of the funds with preference to anything else.

Objection and exception taken by the plaintiff.

No. 5. The defendants offered in evidence the books of accounts of De Ford & Co. and Lothrop Luce & Co.

The plaintiff objects because the same are not kept in the form provided by the Code of Commerce, inasmuch as the same is not a Ledger. Admitted by the court, the plaintiff took an exception. The books bear numbers from 16 to 20 inclusive.

No. 6. The defendants offer in evidence copying-books for letters Nos. 21, 22, 23, 24, 25, 26, 27. The plaintiff objects to the admission thereof and the same having been admitted by the court, the plaintiff took an exception.

No. 7. While the witness Marcelino Torres was testifying, the following questions were put to him:

C. The witness, please: Did you sell that property to any person before, or on, the institution of the foreclosure proceeding?

W. Yes Sir, I sold it to Don Alejandro Alvarado.

C. So, you sold it; please explain what kind of a business was transacted with Alvarado?

W. It was a simulated sale.

The defendant objects to allowing the witness to make explanations with regard to the business transacted with Alvarado in reference to the sale, because said sale, as well as the rescission thereof appear by a public deed introduced as evidence by the plain-
85 tiff himself, inasmuch as evidence tending to change the contents of a public instrument is not admissible and much the less to the prejudice of a third party.

The court sustains defendant's objection and the plaintiff took an exception from the ruling of the court.

C.: On what date did you leave said sale without effect?

W.: Two months afterwards, because Don Alejandro Alvarado's wife was opposed to his transacting the business.

On motion of counsel for defendant, the court ruled the above question and answer to be immaterial and the plaintiff took an exception.

No. 8. While the witness Alejandro Alvarado was testifying the following questions were put to him by the plaintiff.

C.: Was any deed of sale of the property "Semil" executed between Marcelino Torres and the witness?

W.: Yes Sir.

C.: And afterwards, was a deed of rescission executed?

W.: Yes Sir.

C.: Were the papers executed on the date stated in the deed?

W.: Yes Sir.

C.: Was the sale made by Mr. Torres, an actual sale?

Counsel for defendants objects to this question.

The court sustained the objection and the plaintiff takes an exception.

The following question was also put to the witness:

C.: Were such rights and actions as would enable him to demand the annulment of this foreclosure proceeding, ceded to Mr.
86 Torres?

The defendant objects to this question as being immaterial. The court sustained the objection and plaintiff takes an exception.

No. 8. Counsel for plaintiff offers in evidence the testimony of witnesses to prove the damages claimed and the amount of the crops. The court excludes such evidence and the plaintiff takes exception.

No. 9. The witness José Tous Soto, who is the attorney for the defendants, introduced by the latter, testifies as follows:

Q. What is your name?

A. José Tous Soto.

Q. Where do you live?
A. In Ponce.
Q. What is your profession?
A. Attorney-at-law.
Q. Are you the attorney for the defendants, or any of them in this suit?
A. Yes Sir, of Messrs. Lothrop, Luce & Co. and of Mr. Rosaly.
Q. Can the witness testify with regard to the complaint and the answer? Did you hold any official position on the 19th of July, 1904?
A. Yes Sir.
Q. What was that public office?
A. Judge of the District Court for the Judicial District of Ponce, P. R.
Q. Was a motion made to you, as Judge of the Court, by Mr. R. Ulpiano Colón * * * up to page 17 of the suit No. 99 brought by W. S. H. Lothrop against Marcelino Torres Zayas?

87 The plaintiff objects to the question, and the same having been allowed the plaintiff takes an exception.

A. Yes Sir.
Q. Was any order made in pursuance of said motion?

Objection and exception taken by the plaintiff.

A. Yes Sir.
Q. What was the order?

Objection and exception of the plaintiff.

A. Directing a writ of execution to be issued to the marshal to sell the properties at public auction.
Q. Have you found that order in the record of the case just referred to by you.
A. I did not find it.
Q. Did you find it in the judgment-book or in the minutes of the court?
A. I have not found it therein.
Q. In spite of that, are you sure that that order was made?

Objection and exception of the plaintiff.

A. Yes Sir, and as a consequence thereof the writ of execution was issued wherein reference is made to the said order made by the court.
Q. Was that order of the court made in pursuance of another order previously made by the District Court of Ponce?

Objection and exception of the plaintiff.

A. The order of May 3rd and June 16th of the same year the former directed that the defendants should be required to make payments, threatening him with the sale of his property in case he should fail so to do, and the second order directed the sale of the property at public auction.

88 The court directs an entry to be made in the record to the effect that no mention whatever of the said foreclosure proceeding is made either in the minutes of this court or in the judgment book thereof under date of July 19th, 1904; and that no page is missing in either of said books.

No. 10. The defendant puts the following questions to the witness Richard D. Coe:

C.: Does Mr. Coe know of any agreement made between Mr. Rosaly as agent for Messrs. De Ford & Co. and Mr. Torres Zayas, subsequently to the constitution of the mortgage on the property "Semil"?

Plaintiff objects to the question, and allowed by the court the plaintiff takes an exception.

W.: Yes Sir.

C.: Explain to the court what kind of an agreement that was.

Objection and exception of the plaintiff.

W.: It was agreed that De Ford & Company should advance money to Mr. Torres Zayas up to the sum of $5000 with the security of the crop, it being understood that the 5000 pesos should be paid out of the crop.

C.: Did Mr. Torres Zayas issue any notes for the said amount.

Objection and exception of the plaintiff.

W.: Yes Sir.

C.: Is that note among these?

Objection and exception of the plaintiff.

W.: These are the notes.

I, Martin Gill, Judge of the District Court of Ponce, hereby certify that the foregoing bill of exceptions contains a true copy of all the exceptions taken by the plaintiff during the trial held before me in the April term, in the year 1909.

(Signed) MARTIN E. GILL,
Judge of the Court.

89 The exception (allowed by law) from the judgment, where the same is not supported by the evidence, is based on the fact that the evidence introduced shows that the plaintiff proved to be true the facts stated in the complaint showing the irregularities of the foreclosure proceeding, the annulment of which is prayed for in the said complaint; that the plaintiff proved also that in February 1904, the said plaintiff had delivered to the defendant W. S. H. Lothrop the produce of the property "Semil" during that year, which greatly exceeded the sum of four thousand ($4600.00) six hundred dollars; and that the plaintiff proved also that when the said foreclosure proceeding was brought the 8 notes issued in regard to the aforesaid mortgage had already been endorsed and were in the hands of other persons residing in the United States, and that the said notes were not filed with the writing instituting the foreclosure proceeding nor at any stage during the course of said proceeding; and the evidence further shows that the plaintiff established all the allegations made in the complaint, except those regard-

ing damages and proceeds of the produce, the evidence offered in regard to this point having been excluded by the court.

90 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS, Plaintiff and Appellant,
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY Y CAPÓ and ALICE LOTHROP, Defendants and Respondents.

Appeal from the District Court of Ponce.

Opinion of the Court Delivered by Mr. Justice Wolf.

SAN JUAN, PORTO RICO, 18*th of March*, 1910.

Marcelino Torres Zayas and his wife Mercedes Laborde who were the owners of an estate called Semil, on the 26th of February, 1901, appeared before a notary and executed a mortgage on the same in favor of William S. H. Lothrop in the sum of $46,000, which was divided among eight notes signed by the said Torres Zayas to the order of the firm of De Ford & Co. of the city of Ponce. A part of the debt was secured by a mortgage on the estate Monserrate and the owners Collazo, Perez Guerra & Co. joined in the mortgage.

One of the agreements of the contract was that interest at the rate of 10% per annum should accrue on the 26th of February of each year until the principal became due, which would take place on the 26th of February, 1905. The mortgage was made to include the interest payments.

The ninth clause of the mortgage provided that the debtor Torres Zayas should annually deliver to De Ford & Co. the products of the tract Semil to permit said firm first to pay themselves the annual interest and then deliver whatever balance there was to Torres Zayas for the expenses and cultivation of the said lands.

91 It appears that the notes were made out to De Ford & Co. although the deed recites that they were payable to Lothrop; but this mistake and other minor ones were remedied by a suit brought at a later date against the debtor and others, in which it was adjudged that the notes described in the deed were the identical ones previously set forth in this opinion and that Lothrop was in reality the trustee for De Ford & Co. of which firm he was a member. Furthermore, although this discrepancy was made an assignment of error, in the appellants' brief, such error was not put in issue by the pleadings, nor was it raised in the court below and it cannot be raised for the first time in the appellate court.

It is conceded that the appellant paid the interest that accrued in 1902 and 1903, but the appellee maintained that the interest due on the 26th day of February, 1904, was not paid. The appellant asserts

the contrary and the principal contest in the case has been waged about this point.

By reason of this alleged default in the payment Mr. William S. H. Lothrop began in the District Court of Ponce a mortgage proceeding against the debtor Torres Zayas. This mortgage proceeding was commenced on the 25th of April, 1904, Mr. Lothrop having previously obtained the necessary certificate of the state of the Record from the Registry of Property and which certificate showed that the property was recorded in the name of Torres Zayas. On the 25th day of April, 1904, Mr. Torres Zayas by means of a public document conveyed the aforesaid property to Alejandro Alvarado, and the property was finally sold in the foreclosure proceeding to Pedro Juan Rosaly Capó in September, 1904. On the 29th of August, 1905, Fran-
92 cisco Parra representing Don Pedro J. Rosaly appeared before the District Court of Ponce in the same mortgage proceeding and set up that his client was unable to have the property recorded in the Registry because the same appeared to be recorded in the name of Alejandro Alvarado and not in the name of Torres Zayas, and, as this fact made it impossible for this client to obtain a title in due form of the property which he had acquired by virtue of the adjudication made by the marshal, he prayed the court to notify Don Alejandro Alvarado of the adjudication made to Don Pedro Juan Rosaly of the farm Semil in order that the former might pay the sum that was due thereon and the interest, and in the event of his not doing so within ten days that an order should be delivered to the Registry of Property in accordance with the Mortgage Law to cancel the record of ownership which said Alvarado had in his favor. Such an order was accordingly issued to Alvarado and on the 29th of September, 1905, the same Alvarado appeared in the District Court of Ponce and said in substance that at first he had by means of his lawyer, Mr. Llorens Torres, opposed the petition of Mr. Rosaly, but later abandoned his opposition without appearing in the court to make such opposition, and the said Alvarado goes on to say that, desiring to make known in the clearest manner his acquiescence in the petition of Mr. Rosaly, he appears and says "that not being able to pay to Mr. Rosaly the sum for which the plantation Semil was sold, the interest and costs, he joins in the petition made by Mr. Rosaly that the record of ownership which he, Alvarado, had on said property should be cancelled."

Between the time that Alvarado acquired the property from Torres Zayas and the time that he gave his consent to the record aforesaid, he had appeared in the District Court and brought a suit
93 against the present appellees, the grounds of which suit were substantially the same that were brought out in the complaint of Mr. Torres Zayas in this appeal. This suit of Alvarado was abandoned by him apparently without having served such appellees, defendants herein.

On the 20th of April, 1907, a rescission of the contract between Torres Zayas and Alvarado was executed.

The amended complaint in this case was filed on the 15th of January, 1908. In its essential aspects it is a suit for a nullity of all the

proceedings, which resulted in the sale to Mr. Rosaly of the farm Semil.

The defendants in this action are Lothrop, Luce & Co., Pedro Rosaly Capó and Alice Lothrop. Lothrop, Luce & Co. are the successors of De Ford & Co. and Alice Lothrop is the widow of W. S. H. Lothrop.

We have already considered one of the alleged grounds of nullity, namely, the facts that the notes were made payable to De Ford & Co. instead of being made payable to Lothrop.

The next ground of nullity was that the notes were not filed when the mortgage proceeding was begun and that such notes were endorsed to third persons. There does not appear to be anything in the Mortgage Law which requires the notes to be presented at the beginning of the mortgage proceeding. De Ford & Co. were acting as trustee for the holders of the notes and the said notes were returned to them. There was no danger of the defendants being sued by other persons because in the present suit the notes were delivered up cancelled. The endorsement made by De Ford & Co. to James H. Buchanan show moreover that the collection of the notes was left in the hands of De Ford & Co. It does not appear, further-
94 more, that the notes were not in the hands of De Ford & Co. when the proceeding was initiated.

Appellant next alleges that Torres Zayas was married and his wife was not made a party in the mortgage proceeding. Whilst a wife is a necessary party to a deed of land she is not a necessary party in a suit concerning the community property, the husband being the administrator thereof. See sections 161 and 1327 of the Civil Code, and the case of Porto Rican Leaf Tobacco Co. vs. Ereño et al., decided February 16th, 1910.

The fourth objection was that Torres Zayas was not served with a copy of the complaint. The proceeding had been begun before the Code of Civil Procedure went into effect, and there is nothing to show that the citation (requerimiento) was not in the due form required by the Mortgage Law.

The next objection is that there is no order or sentence of the court which authorizes the secretary of the District Court of Ponce to issue an order of execution to the marshal. At the trial of the case the writ issued to the marshal was offered in evidence and shows that there was such an order. Furthermore, on account of the death of the original attorney for the foreclosing parties, Mr. Colón, and of the Secretary of the District Court, the only other witnesses to the execution of the order, the judge in question, who is the attorney of the appellees in this case, took the stand and showed that such an order was issued. It was strenuously objected that this was parole evidence to vary the terms of a written record. It was however the best evidence in existence, and instead of changing the terms of the record, merely supplied something that was lacking.

95 It was then objected that the order of the 3rd of May, 1904, issuing the citation and the order of the 16th of June ordering the auction were incomplete, the first because it was signed by two regular judges and a lawyer by the name of Horacio S. Belaval who was not a judge; and the second because it was

signed by two judges only. The secretary certifies as to the first order that it was signed by the judges of the court (Señores del Tribunal), and this indicates that Belaval was a substitute judge in accordance with the general order of 1899 No. 118. In respect to the second order two judges can give validity to a writ or order and it is sufficient if such order is signed by the instructing judge.

It is then said that an error was originally made with regard to the publication, twenty days not being shown to have elapsed between the announcement of the auction and the public sale; but this error was corrected by a subsequent order of the Court; in other words, whilst the return of the marshal seemed to show that the proper time was not allowed the orders were in point of fact published in due time in the Porto Rico Eagle, and the mistake of the marshal in his return was corrected by the order of the court.

The next objection is that mortgage announcements or edicts did not announce that bids would not be received which did not cover two thirds of the value of the farm. In the original mortgage deed two pieces of property were mentioned, the firm of Collazo Perez Guerra & Co. mortgaging their property Monserrate in part to cover the money loaned to Torres Zayas. The plantation Semil was valued at $40000.00 and its mortgage responsibility fixed at $37-000.00. At the auction sale the property was sold to Mr. Rosaly for $500 and the assumption of the mortgage of $37000.00 and the payment of the receiver's balance. Therefore, as the prop-
96 erty was sold for more than two thirds of the mortgaged value, namely, the assumption of the mortgage of $37000.00 and the payment of $500 cash and said balance, the error, if any, did not prejudice the appellant.

These were substantially all the matters of mortgage procedure which the appellant alleged to be erroneous.

We come now to the consideration of the question of payment. The complainant Torres Zayas alleges in his complaint that he turned over all the products of the mortgaged estate, from the day on which the mortgage was constituted until the 3rd of May 1904, and that the products which were turned over by him to De Ford & Co. during all of that time were sold by them and that the money obtained from such sales exceeded greatly the amount of the interest which was due and payable on February 1904, and that in this manner the interest which was due on the 26th of February 1904 was paid. The defendants put in a general denial to the facts set out in that part of the complaint to which the foregoing allegations relate, admitting only the truth of the contents of the ninth clause in the mortgage. The appellees in their brief admit that all the sums which came from the sale of coffee, the product raised by Mr. Torres Zayas, entered into their hands, with the possible exception of a part of one sale, disposed of by the debtor himself. We have gone over the testimony with care and we do not find that there was any money which came into the hands of De Ford & Co. or their successors proceeding from Torres Zayas, for which no account was rendered. A great part of the time and specially during the period

between 1903 and 1904, De Ford & Co. rendered monthly accounts to Torres Zayas, who never challenged the correctness of their accounts until the complaint in this case was filed. It is true
97 that Alvarado made a similar suggestion in his complaint that more money had passed into the hands of Lothrop Luce & Co. than was necessary to pay the interest; but they abandoned the suit and the fact remains that the first attempt to show that there was more money in their hands was during the trial of the present suit which was several years later. We think the appellant delayed too long in objecting to the accounts of his bankers.

Mr. Rosaly was made a witness of the complainant in the court below and as such witness testified to the fact that the original contract of mortgage was modified by the agreement of the parties, and in part his testimony is corroborated by Mr. Coe, a witness for the defense.

Mr. Rosaly testified substantially that Mr. Torres Zayas needing money for the immediate expense of the cultivation of his property, asked that he should be allowed to draw upon the account which he had with them for the purpose of covering such expenses and this agreement was accordingly made. After the making of this agreement the appellant checked out against his account and the amount of the money that was so checked out did not leave sufficient amount in the hands of De Ford & Co. to pay the interest that fell due on the 26th of February 1904. Mr. Rosaly is contradicted by Mr. Torres Zayas in some respects, but he is not impugned in any way as a witness and as the court below found in favor of the appellees, this branch of the case must be governed by the familiar principle sustained by this court that where there is conflict in the evidence the finding of the lower court will not be disturbed in the absence of passion, partiality or prejudice. The acquiescence in the accounts rendered him was also evidence that the con-
98 tract between the parties had been changed. It is urged by the appellant that the debtors were bound to apply the payment first to the extinction of the mortgage and not to the satisfaction of the checks which were drawn against them; but whether the statements of the witnesses Rosaly and Coe, affirming the change in the contract, are considered along with the acquiescence of Mr. Torres Zayas, we do not think that the principle of section 1140 of the Civil Code is applicable. The original contract was changed by the declarations and acts of the parties.

We think moreover that the acts of Alvarado were a renunciation of any rights that the appellant might have had. The former appeared in court and solemnly announced his acquiescence in the petition of Mr. Rosaly. That petition as we have seen, recited that the citation of Alvarado was necessary to complete title in Mr. Rosaly. Alvarado was the record owner and the ostensible owner. He not only had a duly recorded public document in his favor, but he had begun a suit similar to the present one and this course of action was inconsistent with the possession by anyone else.

The appellant complains that the court erred in not permitting him to show that the conveyance made from Torres Zayas to Alva-

rado was fictitious or simulated and that the real party in interest was always Torres Zayas. We cannot see that the court committed an error in refusing to admit such testimony; at most Alvarado would have to be considered as the agent or representative of Torres Zayas and the maxim qui facit per alium facit per se may be held to apply. The registry system in Porto Rico exists to apprise purchasers and others who are the true owners of property, and if a man after treating with the apparent owner still have his title im-
99 pugned by a secret agreement existing between such record owner and the alleged true owner there would be no security in the acquisition of property.

Some other errors are alleged with respect to the refusal of the court to admit testimony of the value of the coffee turned over during the years 1902 and 1903 and also, of the value of the property turned over from 1903 up to 1908. The question of the amount of coffee that De Ford & Co. had in hand at the time of the mortgage proceeding was fully gone into at the trial, and the amounts received by them during that time accounted for in the manner which we have previously indicated. The object of this offer on the part of the complainant in the court below does not appear very clearly. Its object does not appear to have been to affect the question of payment, but some other purpose which is not made evident. It might have had some bearing if the question of damages was reached; but if such was its purpose, it was not made clear to the court and no prejudicial error could have arisen by reason of the fact that the principal cause of action having failed, the subsiduary ones alleged by the complainants would also have to fail.

The record in this case is prepared in a very clumsy manner. Documents are inserted at large when a mere reference to their contents would have been sufficient. The testimony is presented in the form of question and answer instead of in narrative form as indicated in the case of Lopez vs. Railroad Co., decided on the 28th day of June, 1906. We think that appellees could expedite the consideration of cases in this court by drawing the attention of the judges below to the way in which records are prepared and
100 suggesting amendments to conform to the principles of good practice we have enunciated.

We find no error in the judgment of the court below, and the judgment must be affirmed.

(Signed) ADOLPH G. WOLF,
Associate Justice.

101 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS, Plaintiff and Appellant,
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP, Defendants and Respondents.

Appeal from the District Court of Ponce.

Judgment.

SAN JUAN, PORTO RICO, 18*th March*, 1910.

This court has carefully examined the transcript of record filed herein pursuant to the appeal taken in the above entitled case and properly considered the arguments of counsel in support of their respective claims; and for the reasons stated in the Opinion filed herewith, the Court decides to affirm, as it does affirm, in all its parts, the judgment rendered in said case by the District Court for the Judicial District of Ponce which is the object of this appeal; and the court directs that a copy of this judgment be transmitted in proper form.

Thus we pronounce, command and sign.

JOSÉ C. HERNANDEZ.
JOSÉ MA. FIGUERAS.
JAMES H. MACLEARY.
ADOLPH G. WOLF.

102 In the Supreme Court of Porto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP.

Action involving: 1st. The nullity of a foreclosure proceeding and judicial sale, as well as that of a mortgage and of certain registrations made in the registry of property; 2nd. Claim of certain rents and proceeds of fruits; and 3rd. Damages.

Motion.

Now comes Don Marcelino Torres Zayas, before this Hon. Court, by Charles M. Boerman, his counsel, and states: that feeling himself bound to appeal from the judgment rendered by the Supreme Court of Porto Rico in the above entitled suit, hereby prays this Hon. Court, in pursuance of the statute governing appeals from the

Supreme Court of the Territories of the United States and of Porto Rico, to make proper findings of fact for the purpose of said appeal.

C. M. BOERMAN,
Counsel for Appellants.

103 In the Supreme Court of Porto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO JUAN ROSALY CAPÓ, & ALICE LOTHROP.

Action involving: 1st. The nullity of a foreclosure proceeding and judicial sale, as well as that of a mortgage and of certain registrations made in the registry of property; 2nd. Claim of certain rents and proceeds of fruits; and 3rd. Damages.

Notice of Appeal.

Now comes Marcelino Torres Zayas by Charles M. Boerman, his counsel, and having filed an assignment of errors, which he deems to have been committed by this Hon. Supreme Court in rendering the judgment entered in this case, prays this Hon. Court to make an order allowing the appeal taken from the aforesaid judgment to the Supreme Court of the United States, and fixing the amount of the bond without supersedeas, which the appellant is required to furnish.

C. M. BOERMAN,
Counsel for Appellant.

104 In the Supreme Court of Porto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO JUAN ROSALY CAPÓ, & ALICE LOTHROP.

Action involving: 1st. The nullity of a foreclosure proceeding and judicial sale, as well as that of a mortgage and of certain registrations made in the registry of property; 2nd. Claim of certain rents and proceeds of fruits; and 3rd. Damages.

Assignment of Errors.

The appellant assigns the following errors which he deems to have been committed by the Supreme Court of Porto Rico in rendering judgment in favor of the defendants and appellees.

1. The Supreme Court erred in overruling the first exception of the bill of exceptions filed in this case, which first exception literally

read as follows: "While the witness Pedro Juan Rosaly, an agent of the defendant, was being examined by counsel for plaintiff, the latter offers evidence with regard to the delivery of certain coffee during the years 1901, 1902, 1903, which evidence, without objection from counsel of the defendants, is excluded by the court, and the plaintiff took an exception from this ruling of the court.

2. The Supreme Court erred in overruling the 2nd exception of the Bill of Exceptions, which literally reads as follows: "The court excluded all evidence tending to establish the value of the crops produced by the property "Semil" during the years from 1903, up to the present date, and the plaintiff took an exception from this ruling of the court.

3. The Supreme Court erred in overruling the 3rd exception thereof, which literally reads as follows: "The following ap-
105 pears from the testimony of Mr. Rosaly, while he was answering to questions put to him by counsel for the defendants.

"C. How does the endorsement made on said notes in favor of Buchanan read?

W. For value received we hereby jointly and severally guarantee, in favor of J. A. Buchanan, the payment of the amount of this note at the maturity thereof less our annual commission of two per cent on the interest of said note, waiving all notifications and protests.

C. Then, did De Ford & Co. reserve the right to charge to Buchanan a commission on the amount of the interest of said notes?

W. Yes Sir.

C. Had De Ford & Co. the right, in accordance with the aforesaid endorsement to collect the interest on said note?

W. Of course.

C. Is the witness a merchant and has been so for a long time?

W. Yes Sir.

C. What is the meaning of an indorsement made in this form, under the practice in commerce?

The plaintiff objects to the foregoing question, which was admitted by the court, and from this ruling of the court the plaintiff took an exception.

W. It means that De Ford & Co. remain as trustees of the thing in full, not only for the collection thereof but for any other steps that might be necessary to take even in the courts.

The plaintiff objects to the admission of the question, the court allows the same, and the plaintiff takes an exception from this ruling of the court.

106 C.: What is the meaning of a signature in blank like that affixed by Mr. Buchanan on this note?

The plaintiff objects to the foregoing question, and as the same was allowed by the court, the plaintiff took an exception.

W.: That the same has been returned by him, that the same has been placed by him on the same condition that it had when De Ford & Co. held the same prior thereto.

C.: Did you answer to questions put to you by the adverse party that the stipulation in the mortgage deed with regard to the de-

livery of coffee by Mr. Torres in payment of the interest was modified by a subsequent agreement?

The plaintiff objects to the foregoing question, and allowed by the court the plaintiff took an exception.

W.: Yes Sir.

C.: How was that modification made?

Objection by the plaintiff and exception taken by him.

W.: It was favorable to Mr. Torres and I made the same in behalf of the firm.

C.: Are you an agent for the firm?

Objection and exception taken by the plaintiff.

W.: Yes Sir.

C.: Were they the same contradicting parties who executed the deed?

Objection and exception taken by the plaintiff.

W.: Yes Sir.

C.: Was the modification made only with regard to the application that should be given to the coffee delivered?

Objection and exception taken by the plaintiff.

W.: Yes Sir.

107 C.: State the stipulations submitted by you to Mr. Torres.

Objection and exception taken by the plaintiff.

W.: According to the stipulations contained in the deed, Mr. Torres Zayas had no right to have funds advanced to him for the expenses of the crop; about the middle of the year 1902, he told us that he had the property mortgaged; it was impossible to raise money to advance to him to cover said expenses and it was stipulated that money could be obtained by issuing notes signed by him, said money to be applied by him to the payment of said expenses and the money so advanced should be paid out of the funds with preference to anything else.

Objection and exception taken by the plaintiff.

4. The Supreme Court erred in overruling the 5th exception thereof, which literally reads as follows: "The defendants offered in evidence the books of accounts of De Ford & Co. and Lothrop Luce & Co.

The plaintiff objects because the same are not kept in the form provided by the Code of Commerce, inasmuch as the same is not a Ledger. Admitted by the court, the plaintiff took an exception. The books bear numbers from 16 to 20 inclusive.

5. The Supreme Court erred in overruling the 6th exception thereof, which literally reads as follows: "The defendants offer in evidence copying-books for letters Nos. 21, 22, 23, 24, 25, 26, 27. The plaintiff objects to the admission thereof and the same having been admitted by the court, the plaintiff took an exception.

6. The Supreme Court erred in overruling the exception 7th thereof which literally reads as follows: "While the witness Marcelino Torres was testifying, the following questions were put to him:

108 C.: The witness, please: Did you sell that property to any person before, or on, the institution of the foreclosure proceeding?

W.: Yes Sir, I sold it to Don Alejandro Alvarado.

C.: So, you sold it; please explain what kind of a business was transacted with Alvarado?

W.: It was a simulated sale.

The defendant objects to allowing the witness to make explanations with regard to the business transacted with Alvarado in reference to the sale, because said sale, as well as the rescission thereof appear by a public deed introduced as evidence by the plaintiff himself in as much as evidence tending to change the contents of a public instrument is not admissible and much the less to the prejudice of a third party.

The court sustains defendant's objection and the plaintiff took an exception from the ruling of the court.

C. On what date did you leave said sale without effect?

W. Two months afterwards, because Don Alejandro Alvarado's wife was opposed to his transacting the business.

On motion of counsel for defendant, the court ruled the above question and answer to be immaterial, and the plaintiff took an exception.

7. The Supreme Court erred in overruling the 8th exception thereof which literally reads as follows: "While the witness Alejandro Alvarado was testifying the following questions were put to him by the plaintiff.

C. Was any deed of sale of the property "Semil" executed between Marcelino Torres and the witness?

W. Yes, sir.

C. And afterwards, was a deed of rescission executed?

W. Yes, sir.

C. Were the papers executed on the date stated in the deed?

W. Yes, sir.

109 C. Was the sale made by Mr. Torres, an actual sale?

Counsel for the defendants objects to this question.

The court sustained the objection and the plaintiff takes an exception.

The following question was also put to the witness:

C. Were such rights and actions as would enable him to demand the annulment of this foreclosure proceeding, ceded to Mr. Torres?

The defendant objects to this question as being immaterial. The court sustained the objection and plaintiff takes exception.

Counsel for plaintiff offers in evidence the testimony of witnesses

to prove the damages claimed and the amount of the crops. The court excludes such evidence and the plaintiff takes exception.

8. The Supreme Court erred in overruling the 9th exception thereof which literally reads as follows: "The witness José Tous Soto, who is the attorney for the defendants, introduced by the latter, testifies as follows:

Q. What is your name?
A. José Tous Soto.
Q. Where do you live?
A. In Ponce.
Q. What is your profession?
A. Attorney-at-law.
Q. Are you the attorney for the defendants, or any of them in this suit?
A. Yes, sir, of Messrs. Lothrop, Luce & Co. and of Mr. Rosaly.
Q. Can the witness testify with regard to the complaint and the answer? Did you hold any official position on the 19th of July, 1904?
A. Yes, sir.
Q. What was that public office?
A. Judge of the District Court for the Judicial District of
110 Ponce, P. R.
Q. Was a motion made to you, as Judge of the Court, by Mr. R. Ulpiano Colom —— up to page 17 of the suit No. 99 brought by W. S. H. Lothrop, against Marcelino Torres Zayas?

The plaintiff objects to the question, and the same having been allowed the plaintiff takes an exception.

A. Yes, sir.
Q. Was any order made in pursuance of said motion?

Objection and exception taken by the plaintiff.

A. Yes, sir.
Q. What was the order?

Objection and exception of the plaintiff.

A. Directing a writ of execution to be issued to the marshal to sell the properties at public auction.
Q. Have you found that order in the record of the case just referred to by you.
A. I did not find it.
Q. Did you find it in the judgment-book or in the minutes of the court?
A. I have not found it therein.
Q. In spite of that, are you sure that that order was made?

Objection and exception of the plaintiff.

A. Yes, sir, and as a consequence thereof the writ of execution was issued wherein reference is made to the said order made by the court.

Q. Was that order of the court made in pursuance of another order previously made by the District Court of Ponce?

Objection and exception of the plaintiff.

A. The order of May 3rd and June 16th of the same year, the former directed that the defendants should be required to make payment, threatening him with the sale of his poroperty in case
111 he should fail so to do, and the second order directed the sale of the property at public auction.

The court directs an entry to be made in the record to the effect that no mention whatever of the said foreclosure proceeding is made either in the minutes of this court or in the judgment-book thereof under date of July 19th, 1904; and that no page is missing in either of said books.

9. The Supreme Court erred in overruling the 10th exception thereof which literally reads as follows: "The defendant puts the following questions to the witness Richard D. Coe:

C. Does Mr. Coe know of any agreement made between Mr. Rosaly as agent of Messrs. De Ford & Co. and Mr. Torres Zayas, subsequently to the constitution of the mortgage on the property "Semil."

Plaintiff objects to the question and allowed by the court the plaintiff takes an exception.

W. Yes, sir.

C. Explain to the court what kind of an agreement that was.

Objection and exception of the plaintiff.

W. It was agreed that De Ford and Co. should advance money to Mr. Torres Zayas up to the sum of $5000 with the security of the crop, it being understood that the 5000 dollars should be paid out of the crop.

C. Did Mr. Torres Zayas issue any notes for the said amount?

Objection and exception of the plaintiff.

W. Yes, sir.

C. Is that not among these?

Objection and exception of the plaintiff.

W. These are the notes.

10. The Supreme Court erred in affirming the decision of the District Court of Ponce overruling the demurrer to the answer.

112 11. The Supreme Court erred in allowing the 9th clause of the mortgage deed, which is a public document, to be contradicted by oral evidence, contrary to the provisions of the laws in force.

12. The Supreme Court erred in holding the foreclosure proceedings to be valid, although the defendant had not been summoned to appear therein.

13. The Supreme Court erred in holding the foreclosure proceedings to be valid, notwithstanding the fact that the plaintiffs had not

personally any right to foreclose and failed to produce the mortgage notes.

14. The Supreme Court erred in holding the sale made under the foreclosure proceeding to be valid although said sale was not subject to any rate of valuation, which was contrary to the law in force.

15. The Supreme Court erred in holding that the judgment rendered in the foreclosure proceedings was valid though the same was not signed by the three judges then constituting the court.

16. The Supreme Court erred in holding the sale made in the foreclosure proceeding, to be valid though the consent of the wife of the defendant had not been obtained.

17. The Supreme Court erred in holding that the conveyance of the property under execution made by Mr. Torres in favor of Mr. Alvarado, and the constitution of a mortgage thereon in favor of the former, deprived the said Torres of the right to make any claim with regard to the annulment of the said foreclosure proceeding.

18. The Supreme Court erred in holding that the consent of Mr. Alvarado given after the sale, stating that as he had no money to make payment he could not do otherwise, deprived the said
113 Torres of the right to bring an action requesting the annulment of the foreclosure proceeding.

19. The Supreme Court erred in not rendering judgment in favor of the appellant and against the defendant Alice Lothrop, the latter having been duly summoned according to the law now in force, and her default having been entered.

20. The Supreme Court erred in holding that the marshal of the District Court of Ponce had power to sell the property foreclosed without a written judgment rendered and entered by the trial court.

21. The Supreme Court erred in holding the foreclosure proceeding to be legal and constitutional.

22. The Supreme Court erred in affirming the judgment rendered by the District Court of Ponce.

Respectfully,

C. M. BOERMAN,
Counsel for Appellant.

114 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS, Plaintiff and Appellant,
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP,
Defendants and Respondents.

Appeal from the District Court of Ponce.

Order.

SAN JUAN, PORTO RICO, *June 7th*, 1910.

The appeal taken by the plaintiff and appellant in the above entitled case from the judgment rendered by this Court on the 18th

of March 1910, to the Supreme Court of the United States, is hereby allowed; the bond to be furnished by the appellant to answer for the costs which may be caused to the adverse party by virtue of said appeal, is hereby fixed in the sum of one thousand dollars; the term of sixty days is granted for the translation and preparation of the transcript of record, and it is hereby ordered that inasmuch as the statement of the case and bill of exceptions settled by the Hon. Martin E. Gill, Judge of the District Court of Ponce, is the same statement of the case and bill of exceptions which this court has considered in deciding the appeal taken to this Court, the said statement of the case and bill of exceptions shall be included and made a part of the transcript of record to be transmitted to the Supreme Court of the United States pursuant to the appeal taken herein to the said Court.

It was agreed and signed by the justices of the Supreme
115 Court.

JOSÉ C. HERNANDEZ.
J. H. MacLEARY.
ADOLPH G. WOLF.
EMILIO DEL TORO.

116 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS, Plaintiff and Appellant,
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP,
Defendants and Respondents.

Appeal from the District Court of Ponce.

The Hon. the Supreme Court of Porto Rico:

Now comes Marcelino Torres Zayas, by Charles M. Boerman, his counsel, and states: That he has filed a notice of appeal and an assignment of errors, and that under date of the 7th of June, 1910, this Court has allowed the appeal and fixed the bond in the sum of One Thousand Dollars.

That he wishes to have in this case the benefit of an appeal and a writ of error.

He prays the Hon. Supreme Court to approve the bond filed herewith and to authorize the issuance of the writ of error and citation also filed herewith for the purposes required by law.

C. M. BOERMAN,
Counsel for Appellant.

117 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS, Plaintiff and Appellant,
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP,
Defendant- & Respondents.

Appeal from the District Court of Ponce.

Know all men by these presents that We Marcelino Torres Zayas as principal and Enrique Alvarado and Antonio Franceschi as sureties are bound unto Lothrop Luce & Co., Pedro Juan Rosaly y Capó and Alice Lothrop, in the just sum of One Thousand ($1000) Dollars to be paid to the said Lothrop Luce & Co., Pedro Juan Rosaly y Capó and Alice Lothrop, their agents, executors, administrators or legal representatives to the payment of which fully and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of June 1910.

Whereas, lately at a session of the Supreme Court of Porto Rico, in a certain case pending in said court wherein Marcelino Torres Zayas is plaintiff and appellant, and Lothrop Luce & Co., Pedro Juan Rosaly y Capó and Alice Lothrop, are defendants and appellees, a judgment was rendered against the said Marcelino Torres Zayas and the said Marcelino Torres Zayas having obtained from the said Court an order allowing an appeal or writ of error to the Supreme Court of the United States for the purpose of reversing the judgment in said case, and whereas a citation is about to be
118 issued to the said Lothrop Luce & Co., Pedro Juan Rosaly y Capó and Alice Lothrop, citing and admonishing them to appear in the Supreme Court of the United States.

Now therefore, the condition of the said obligation is such that if the said Marcelino Torres Zayas prosecutes this appeal or writ of error to effect and answers all damages and costs which may be adjudged against him in case he fails to make his plea good, then, the said obligation is to be null and void; otherwise to remain in full force and virtue.

MARCELINO TORRES.
ENRIQUE ALVARADO.
ANTONIO FRANCESCHI.

Enrique Alvarado duly sworn says: That he is a resident and property owner of Porto Rico, and that he holds visible property in Porto Rico for a value greater than $1000, over and above all liabilities and debts.

ENRIQUE ALVARADO.

No. 107.

Sworn to and subscribed before me by Don Enrique Alvarado, personally known to me, on this 15th day of June, 1910.

[SEAL.] TOMÁS CASTILLO,
Notary Public.

Antonio Franceschi duly sworn says: That he is a resident and property owner in Porto Rico and that he holds visible property in Porto Rico for a value greater than 1000 dollars over and above all liabilities and debts.

ANTONIO FRANCESCHI.

119 Sworn to and subscribed before me by Don Antonio Franceschi, personally known to me, on this 15th day of June, 1910.

[SEAL.] TOHÁS CASTILLO,
Notary Public.

Approved on this 22nd June 1910.

JOSÉ C. HERNANDEZ,
Chief Justice.

120 In the Supreme Court of Porto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY Y CAPÓ, & ALICE LOTHROP.

Motion for Extension of Time.

Charles M. Boerman, counsel for appellant Marcelino Torres Zayas duly sworn says: That the transcript of the record to be transmitted to the Supreme Court of the United States is very voluminous and contains about One Hundred Thousand words, which have to be translated from the Spanish into the English language, and the term of 60 days allowed by law to file the record in the Supreme Court of the United States is not sufficient to make the translation and transcript and to have the same properly certified. That he has information to the effect, and believes, that 60 days in addition to the time given by law will be required to make that work.

Therefore, your petitioner prays this Hon. Court to make an order allowing an extension of 60 days in addition to the term of 60 days given by law.

C. M. BOERMAN,
Counsel for Appellant.

Sworn to and subscribed before me by Charles M. Boerman, personally known to me on this 29th day of June 1910.

A. F. CASTRO,
Secretary of the Supreme Court.

121 In the Supreme Court of Porto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY Y CAPÓ, & ALICE LOTHROP.

Order.

SAN JUAN, PORTO RICO, *June 29th*, 1910.

In accordance with the foregoing motion, the term fixed in the citation issued in the above entitled case, pursuant to the appeal taken therein to the Supreme Court of the United States is hereby enlarged until the 1st of November 1910.

It was so ordered and signed by the Hon. Adolph G. Wolf, Associate Justice of the Supreme Court.

ADOLPH G. WOLF.

122 In the Supreme Court of Porto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP.

Agreement.

The parties hereby agree to allow sixty days in addition to the term given by law for the transmission of the record in this appeal to the Supreme Court of the United States.

C. M. BOERMAN,
Counsel for Appellant.
J. T. SOTO,
Counsel for Appellee.

123 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS, Plaintiff and Appellant,
vs.
LOTHROP, LUCE & CO., PEDRO J. ROSALY CAPÓ, and ALICE LOTHROP,
Defendants & Respondents.

Appeal from the District Court of Ponce.

Order.

SAN JUAN, PORTO RICO, *13th of October*, 1910.

The time fixed in the citation issued pursuant to the appeal filed in the above entitled case for filing the transcript of record in the

Supreme Court of the United States, heretofore extended until the 1st of November, 1910, by order of this Court dated the 29th of June last, is hereby further extended up to the 1st of December, 1910.

It was agreed by the Court and the acting Chief Justice signs; attest.

J. H. MacLEARY.

A. F. CASTRO, *Secretary.*

124 In the Supreme Court of Porto Rico.

No. 337.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & Co., PEDRO JUAN ROSALY CAPÓ, and ALICE LOTHROP.

Action involving: 1st. The nullity of a foreclosure proceeding and judicial sale, as well as that of a mortgage and of certain registration made in the Registry of Property; 2nd. Claim of certain rents and proceeds of fruits; and 3rd. Damages.

Findings of Fact.

1. On the 26th day of February, in the year 1901, the plaintiff Don Marcelino Torres Zayas, who was then married to Doña Mercedes Laborde Perez, entered into a mortgage contract with Mr. William Sturgis Hooper Lothrop, by a public deed, wherein he admitted to be owing to the said Mr. Lothrop the sum of forty six thousand dollars, which he bound himself to pay on the 21st day of February, 1905, and he bound himself to pay ten per cent per annum, as interest on the said amount, the payment of the interest to be made at the expiration of each year, on the 21st day of February of each of the ensuing years; and as security of said principal and interest, a voluntary mortgage was con-
125 stituted upon a coffee plantation named "El Semil," which was given a value of forty thousand dollars, and also upon other properties. It was also stipulated in the contract that the forty six thousand dollars should be represented by eight notes issued in favor and to the order of the creditor, and for the amount of five thousand seven hundred and fifty dollars each, bearing interest at the rate of ten per cent per annum, and all payable on the 21st day of February 1905. The mortgage deed was properly recorded in the Registry of Property.

2. The said mortgage deed contains a clause which literally copied reads as follows: "Ninth. The contracting parties agree that all the produce of the two properties firstly described shall be delivered to Messrs. De Ford & Co. of this city, to be sold by them at the highest price that can be obtained in this market, so as to de-

duct from the value of said produce the amount of the interest which shall be paid annually to the creditors, and the balance, if any, shall be delivered to the debtor Mr. Torres Zayas for the expenses and maintenance of the said properties, the latter being bound to apply to the payment of the principal of the debt such sum as may exceed the amount of said expenses." The witness Mr. Rosaly, who was corroborated by the witness Mr. Coe, avers, in opposition to the denial made by Mr. Torres Zayas, that the agreement above mentioned was substituted by another, whereby it was agreed that from the value of said produce the current liabilities of Mr. Torres Zayas should first be paid, Mr. Rosaly having testified that he thinks that the above modification was made after the constitution of the mortgage, and that it was made verbally. Up to the time of the default in payment of interest, accounts of the receipts of Lothrop Luce & Co., from the plantation Semil were rendered each month to the debtor Torres Zayas, and of his debits and credits, and the latter never questioned the correctness of
126 these accounts.

3. That, by mutual error of the parties, the said notes were drawn in the name of Messrs. De Ford & Co., instead of William S. Lothrop, and six of them were endorsed by Messrs. De Ford & Co. in favor of Mr. James H. Buchanan, who endorsed the same to Riggs National Bank; another note was endorsed by De Ford & Co. in favor of S. V. R. Crosby and by the latter to Henriett M. Crosby; and another note was endorsed by De Ford & Co., with the following endorsements: "Pay First National Bank Boston, Mass. or order Union Trust Co. of the District of Columbia, Edson B. Olds, Treasurer." And with another endorsement which reads: "Pay to the order of Miss Alice Lothrop the sum of thirty two hundred and fifty dollars, present amount due on this note. Value received. Ponce, April the 7th, 1906, pro Lothrop Luce & Company, P. J. Rosaly."

The text of the said notes reads as follows: "Ponce, Porto Rico, Feb. 25th, 1901. $5750.00. Four years after date, for value received, I promise to pay to the order of Messrs. De Ford & Co., at the place of business of De Ford & Co., Boston, Mass., Five Thousand Seven Hundred and Fifty dollars, with interest at the rate of ten per centum per annum, interest payable annually, for such time as said principal sum or any part shall remain unpaid, having on this date executed as security for the payment of said sum and interest to Henry De Ford, Trustee, a certain first mortgage upon a certain coffee plantation—596 cuerdas—known as "Semil," situated in the municipal district of Juana Diaz; and also a certain first mortgage upon certain pasture lands—400 cuerdas—known as "La Monserrate," situated in the municipal district of Ponce. This is the first (second, third, etc.) of a series of eight notes for five thousand seven hundred and fifty dollars each, making in all forty six thousand dollars. Marcelino Torres."

127 At the trial the defendant offered as proof the notes described by the mortgage, cancelled. The question of the correctness of the description of the payees of the notes was raised

between the parties in a separate suit and the error in the description was corrected therein by a judgment of the Court, Torres Zayas being one of the parties.

4. That Mr. Zayas in pursuance of the stipulations contained in the mortgage deed, delivered the produce, that is, the coffee of the property Semil, to Messrs. De Ford & Co., and did so also in the year 1904. The value of the produce delivered in the year 1904 exceeded the amount of the interests due in that year, but this amount was credited by Messrs. De Ford & Co. to the current account of Mr. Torres Zayas to pay for the maintenance of the property and other expenditures, in such a manner that the interest due in that year did not appear to have been paid in the book of the firm De Ford & Co.

5. That on the 25th day of April, 1904, Mr. William S. H. Lothrop instituted a foreclosure proceeding in the District Court of Ponce against Don Marcelino Torres Zayas, with regard to the property Semil. That in the said proceeding, the mortgage deed and the certificate of the Registrar of property with regard to the registration of the property, were exhibited, but the eight notes referred to were not filed with the complaint, nor produced. That a notification for payment of the interest was made to Don Marcelino Torres, but not to his wife. That no citation, nor any copy of the complaint, had been delivered either to him or to his wife. That the order requiring payment to be made was signed by two regular judges of the three who constituted the court, and by Mr. H. S. Belaval. That with the exception of the order requiring the debtor to pay, no order or proceeding of the court was ever notified
128 to them during the course of the whole foreclosure proceeding, nor were them required to pay any amount whatsoever after the auction sale took place. That on the 16th of June, 1904, an order was made, signed by two of the three judges who then constituted the court, directing the mortgaged property to be sold at public auction within the term of twenty days, that is, the first sale to take place within that time after the fixing of the notices and publication thereof in a local newspaper, it being stated in said notices that no bid which was not sufficient to cover two thirds of the estimated value of the property would be admitted. That the said notices did not contain, however, the value given to the property which was to serve as rate of valuation for the purposes of the auction sale, nor was it stated, either, in said notices, that bidders had to make a deposit of 10%, as required by said order. That on the 30th of July, 1904, the marshal of the District Court of Ponce attached the property Semil, and on the 12th of September of the same year, sold the same at public auction, which was the only one had, by virtue of a writ of execution issued by the Secretary of the District Court of Ponce, on the 22nd day of July, 1904, wherein the following is contained: "That on the 19th day of July, 1904 judgment was rendered in favor of W. S. Lothrop against Torres Zayas, for the sum of $4600,00 as interest due." That the judgment alleged to have been entered on the 19th of July, 1904, and referred to in the above writ does not appear in the record of the said proceeding for the foreclosure of mortgage, although the pages of said record

are all properly numbered, and not a single page is missing, all its pages being complete without erasures or amendments of any kind; and that neither in the official judgment book of the court, nor in the minutes of the Secretary, nor in the minutes book of the court, relating to the month of July, 1904, nothing appears to show that on the 19th day of July, 1904, nor *in* any other day, any
129 judgment had been entered, or any order for attachment or execution, made, nor any reference is therein made with regard to the said proceeding for the foreclosure of mortgage, above mentioned. That by the oral testimony of Mr. José Torres Soto, counsel for the defendant in this suit, and who was judge of the District Court of Ponce during the month of July, 1904, it was shown that on the 19th day of July, 1904, he ordered, as judge of said court, that a writ of execution should be issued to the marshal, directing him to sell the property at public auction, and as a consequence thereof the writ of execution was issued, that is to say, the writ above referred to. The only other known witnesses to the order of the court referred to, namely the attorney who brought the proceeding and the secretary of the court, were dead. The return of the marshal recites the order of the court of July 19, 1904. That at the only auction sale had, which took place on the 12th of September, 1904, the mortgaged property was sold to P. J. Rosaly for $500.00, plus the costs and the expenses of the proceeding, the purchaser having bound himself to make the payment of the mortgage constituted in favor of Mr. W. S. H. Lothrop. That all the incidents above referred to, regarding the foreclosure proceeding, appear in the registrations made in the Registry of Property, where the property Semil has been recorded.

6. That, subsequently, on the 7th of October, 1905, the marshal of the District Court of Ponce executed a deed of judicial sale of the said property Semil in favor of the defendant Don Pedro Juan Rosaly y Capó, and in the same date Mr. Rosaly y Capó constituted a mortgage thereon for the sum of $30000.00 in favor of the mercantile partnership Lothrop Lucie & Co., who are also defendants in this suit.

7. That Mr. Rasaly y Capó purchased the property at the
130 auction sale as trustee of the mercantile partnership De Ford & Co., of which Mr. William Sturgis H. Lothrop was a member. That, afterwards, the mercantile partnership Lothrop Luce & Co. was constituted, of which partnership Mr. William S. H. Lothrop was also — member, the said partnership acting as successor to the partnership De Ford & Co. That on the 7th of October, 1905, when Mr. Rosaly constituted the mortgage in favor of Lothrop Luce & Co. he was an attorney-in-fact for the latter firm, and that the actual owners of the property at that time were Lothrop Luce & Co.

8. That on the 25th day of April, 1904, Don Marcelino Torres y Zayas sold, by a public instrument, the said property Semil to Don Alejandro Alvarado y Laborde, for the sum of $50000.00, the purchaser constituting in the same deed of sale a mortgage upon the said property in favor of the vendor to secure the payment of the purchase price, the vendor having admitted to have received only $2500.00 amount of a debt formerly contracted by the vendor

in favor of the purchaser, and the balance of the $50000.00, which constituted the purchase price, was owed by the vendor, and as security for said balance the mortgage referred to was constituted. That Mr. Zayas testified that this sale was simulated. That on the 20th of April, 1907, Mr. Alejandro Alvarado y Laborde, with the consent of Mr. Torres y Zayas, rescinded, by a public instrument, the aforesaid deed of sale and mortgage, stating, among other reasons, that Mr. Alvarado's wife had not given her consent to the constitution of the mortgage, and stating, further, therein, that said rescission has been mutually and privately agreed upon, in the year 1905, and that they have agreed to cause said rescission to appear in a public instrument, under this date.

9. That on the 5th day of September, 1905, an order was made by the District Court of Ponce in the foreclosure proceeding
131 of the mortgage constituted upon the property Semil, whereby Don Alejandro Alvarado was required to make payment within ten days of the price of the sale of the property Semil made in favor of Don Pedro Juan Rosaly, and of the interest due thereon and costs, the said Alvarado having been warned that in case he should fail so to do a writ should be issued to the Registrar of Property for the cancellation of the registration of ownership therein made in his favor with regard to said property. That as a consequence of this notification for payment made to Mr. Alvarado, the latter made in court, the following statement, which literally reads as follows: "In the District Court for the Judicial District of Ponce, P. R.—To the Hon. José Tous Soto.—Now comes before Your Honor Alejandro Alvarado, of age and a resident of Juana Diaz and states: that under date of the 16th of September, a requirement was made to him by order of this Court, to pay over to Don Pedro Juan Rosaly, within the following ten days, the sum which the latter had in his turn paid for the property Semil, at the auction sale of said property which was had by virtue of a foreclosure proceeding instituted by Mr. William Sturgis Hooper Lothrop against Don Marcelino Torres y Zayas, the said Alvarado having been warned that in case he should fail so to do a writ should be issued to the Registrar of Property for the cancellation of the registration of ownership made therein in his favor in regard to said property and to appear before the court within that time, having previously notified Mr. Rosaly, to show sufficient reasons why he should be excused from obeying the said order. That although he notified within that time, by his counsel Mr. Llorens Torres, an opposition to the petition of Mr. Rosaly, be abandoned the same later on by failing to appear before the court to sustain the same at the date set for the hearing
132 thereof. And that as he desires to make known in a clear manner his acquiescence in the motion of the petitioner, he now appears and states: that being unable to pay to Mr. Rosaly the sum for which the plantation Semil was sold, and the interest and cost, he joins in the petition made by him, that the registration of ownership which he, Alvarado, had upon the said property should be cancelled. Ponce, September 29th, 1905.—(Signed) Alejandro

Alvarado.—Sworn to before me this 29th day of September, 1905.—W. V. Robbins, United States Commissioner."

10. That on the 3rd of June, 1904 Mr. Alejandro Alvarado Laborde brought a suit in the District Court of Ponce against Mr. William Sturgis H. Lothrop praying for a declaration of nullity of the proceeding for the foreclosure of mortgage, instituted by Mr. Lothrop against Mr. Torres Zayas, and made, also, a motion requesting a preliminary injunction to be issued to stay the auction sale of the property Semil. That on the 5th day of August, 1904, the following order was made in that suit, which literally copied reads as follows: "Injunction in case No. 186.—Alejandro Alvarado, counsel Llorens.—vs.—William Sturgis Hooper Lothrop.—To stay a foreclosure proceeding.—The court order- the dismissal of this case because it has been twice set for hearing and counsel has failed to appear to-day."

11. That Mr. William Sturgis Hooper Lothrop died in the year 1906, his only heiress being his widow, the defendant Alice Lothrop.

12. That on the 14th day of May, 1906, Mr. Pedro Juan Rosaly brought a suit in the District Court of Ponce against Lothrop Luce & Co. and Alice Lothrop—involving the extinction of a mortgage,—and that by consent of the defendant the following judgment was therein entered, which literally copied reads as follows: "Suit No. 141.—Pedro Juan Rosaly vs. Lothrop Luce & Co. and Alice Lothrop.—Extinction of a mortgage.—Whereas: on the 14th day of May, 1906, Don Pedro Juan Rosaly filed, in the office of the secretary of this court, a complaint against the partnership Lothrop, Luce & Co. and Alice Lothrop, wherein a prayer for a declaration of extinction of a mortgage, for thirty seven thousand dollars, constituted upon the property Semil, was made; substantially alleging therein that the plaintiff was the owner of the said property Semil, described in the complaint, that he had acquired the same at public auction in the foreclosure proceeding instituted by Mr. W. S. H. Lothrop against Don Marcelino Torres Zayas, with the mortgage of thirty seven thousand dollars referred to, which was constituted to secure the payment of certain obligations payable to order, each for five thousand seven hundred and fifty dollars; that the said notes or obligations payable to order had been paid by him to Messrs. Lothrop Luce & Co., who are the owners thereof, as shown by a public instrument executed on the 6th of April, 1902, before Don Luis Yordán Dávila, a Notary Public; and that the said mortgage constituted upon the plantation Semil was so constituted by Don Marcelino Torres Zayas in favor of Don W. S. Lothrop, whose only and universal heiress is the defendant Mrs. Alice Lothrop.—Whereas: the defendants appeared in said action and served upon the plaintiff an offer to allow judgment to be taken against them without trial, as prayed for in the complaint, under section 313 of the Code of Civil Procedure, which offer was duly accepted by the plaintiff.—therefore, by order of the court, judgment is hereby entered in this case against the defendant, and the mortgage constituted upon the plantation Semil, which is the property of Don Pedro Juan Rosaly, for the sum of thirty-seven thousand dollars, is hereby declared to be

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extinguished, the said mortgage having been constituted by
134 Don Marcelino Torres Zayas in favor of Mr. William Sturgis Hooper Lothrop, and recorded in the Registry of Property of Ponce, P. R., the description of the said plantation Semil being as follows: "A coffee plantation, named "El Semil", situated in the ward Villalba-arriba, in the municipal jurisdiction of Juana Diaz, covering an area of five hundred and thirty five cuerdas and sixteen hundredths, equivalent to two hundred and ten hectares fifty three ares and ninety two centiares, with a wooden dwelling house, covered with zinc, warehouse, and other dependencies. The said property is bounded in the North by a public road and by lands belonging to Juan Felix Baez, Socorro García and the succession of Don Severo Cegarra; on the East, by lands belonging to Don Domingo Olivieri, the succession of Catalina Matos, to Lucas Negrón, Julián Negrón, to the said Don Domingo Olivieri, to the succession of Juan Angel Rosario, to Tomás Negrón and to José Torres; on the South, by lands belonging to Don José Genaro Rivera, José del Carmen and Domingo Negrón, Marcial Serrallés, Eduvigis Rodríguez, Ramón Sanchez, Pedro Morales and Don Antonio Santi; and on the West, by a public road and lands of José del Carmen Negrón, Juan Zaragoza and the succession of Severo Cegarra", no special condemnation of the costs being made.—Judgment entered in the city of Ponce, P. R. this 18th day of May, 1906.—Francisco Barnés Plaja.—Secretary District Court."

The foregoing findings of fact are hereby adopted and certified by the Supreme Court of Porto Rico, and it is directed that the same be filed as part of the record in this case, and transmitted as such to the Supreme Court of the United States, instead of the statement of the case which contains the evidence-at-large.

JOSÉ C. HERNANDEZ.
J. H. MacLEARY.
ADOLPH G. WOLF.

135 En el Tribunal Supremo de Puerto Rico.

MARCELINO TORRES ZAYAS
vs.
LOTHROP, LUCE & CIA. te al.

Præcipe for Record.

To the Secretary of the Court.

Please to prepare and transmit to the Supreme Court of the United States the whole Record in this case, substituting the Findings of facts made by this Court for the exposition of the case sent by the lower court, omitting the motions and orders of extension of time, and including the stipulation for extension to transmit this record made between the attorneys and filed herein.

C. M. BOERMAN.
Attorney for Appellant.

136 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Hon. Judges of the Supreme Court of Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Porto Rico, before you, between Marcelino Torres Zayas, plaintiff and appellant, and Lothrop Luce and Company, Pedro Juan Rosaly y Capó and Alice Lothrop, defendants and appellees, a manifest error has happened, to the great prejudice and damage of the said plaintiff and appellant, Marcelino Torres Zayas, as is said and appears by the petition herein.

We, being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, disti-ctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States in the City of Washington, District of Columbia, together with this writ, so as to have the same at the said place on the 60th day from this date, that the record and proceedings aforesaid be- inspected, the said Supreme Court of the United States may cause further to be done therein to correct those errors what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of June 1910.

Attest my hand and seal of the Supreme Court of Porto
137 Rico at the Clerk's office at San Juan, Porto Rico, on the day and year last above written.

[Seal Supreme Court of Porto Rico, United States of America.]

A. F. CASTRO,
Secretary of the Supreme Court of Porto Rico.

Allowed this 22nd day of June, 1910.

JOSÉ C. HERNANDEZ,
Chief Justice of the Supreme Court of Porto Rico.

138 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Lothrop, Luce and Company, Pedro Juan Rosaly y Capó and Alice Lothrop, Greeting:

You are hereby cited and admonished to be and appear at the Suprem Court of the United States, held at the City of Washington in the District of Columbia, within sixty days from the date of this writ, pursuant to an appeal and writ of error filed in the Clerk's office of the Supreme Court of Porto Rico, wherein Marcelino Torres Zayas is plaintiff in error and appellant, and you are defendants in

error and appellees, to show cause, if any there be, why the judgment in the said appeal and writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 22nd day of June, A. D. 1910, and of the Independence of the United States the one hundred and twenty fourth.

JOSÉ C. HERNANDEZ,
Chief Justice of the Supreme Court of Porto Rico.

Attest:

[Seal Supreme Court of Porto Rico, United States of America.]

A. F. CASTRO,
Secretary.

[Endorsed.]

Received this writ this 22nd day of June, 1910, and served the same by sending by registered mail a true copy thereof to the within named Pedro Juan Rosaly and to Jose Torres Soto the attorney of record to Ponce, P. R., where they reside. This at San Juan, P. R., this 22nd day of June 1910.

S. C. BOTHNELL,
Marshal.

139 Supreme Court of Porto Rico.

Island of Porto Rico.

I, Antonio F. Castro, Secretary and Reporter of the Supreme Court of Porto Rico, do hereby certify: that the foregoing is a true copy, faithfully translated into the English language, of all papers filed, and proceedings had and entered in a certain cause lately pending in said court, wherein Marcelino Torres Zayas, is plaintiff and appellant, and Lothrop Luce & Co., Pedro Juan Rosaly Capó and Alice Lothrop, are defendants and respondents; that I have compared the same with their respective originals, and that they are true and faithful transcripts therefrom, and of the whole thereof, having omitted only the statement of the case settled by the trial judge, which has been substituted by the findings of fact prepared and certified by the Supreme Court of Porto Rico, and the motions and orders of extension of time filed in the record, this transcript of record having been prepared in accordance with a præcipe filed by counsel for appellant herein.

In witness whereof I hereunto set my hand and affix the seal of said Supreme Court, at the city of San Juan, Porto Rico, this 1st

day of November, in the year of our Lord, one thousand nine hundred and ten.

[Seal Supreme Court of Porto Rico, United States of America.]

A. F. CASTRO,
Secretary and Reporter of the Supreme Court of Porto Rico.

$1 stamp, cancelled Nov. 1, 1910. A. F. C.

Endorsed on cover: File No. 22,404. Porto Rico Supreme Court. Term No. 435. Marcelina Torres Zayas, appellant and plaintiff in error, vs. Lothrop, Luce & Company, Pedro Juan Rosaly y Capo, and Alice Lothrop. Filed November 16th, 1910. File No. 22,404.

No. 17

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM 1912

Office Supreme Court, U.
FILED.
JAN 10 1913
JAMES H. McKENNE
Clerk

MARCELINO TORRES ZAYAS

Appellant

vs

LOTHROP LUCE & CO., PEDRO JUAN ROSALY CAPO AND ALICE LOTHROP

Apellees.

SUGGESTION OF DEATH

AND

MOTION

Now comes Charles M. Boerman of counsel for the apellant and suggest to the Court the death of Pedro Juan Rosaly Capo one of the apellees and moves the Court for an order on his heirs and legal representatives to make appearance not later than within ten days

after the begining of the next Term of this Court, and that in case they do not appear the case will be proceeded with in their default.

C. M. BOERMAN.
of Counsel

Marcelino Torres Zayas declares under oath that he is the apellant in the above entitled cause and that Pedro Juan Rosaly Capo, one of the apellees therein has since the appeal was proceeded with deceased this life.

MARCELINO TORRES ZAYAS.

Sworn to before me
his day of January 1913